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91-2015

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

F. JOSEPH LOEPER, ROBERT C. JUBELIRER, D. MICHAEL FISHER, CHARLES LEMMOND, HANK SALVATORE, NOAH WENGER AND MATTHEW RYAN
Petitioners,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commission, Elections, and Legislation, Department of State, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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June 8, 1992

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QUESTIONS PRESENTED

Does a court, in adopting a statewide congressional redistricting plan, violate a duty, recognized by other state and federal courts, to provide a full and fair hearing and to protect the rights of the absent but affected public, when it limits itself to considering only plans submitted by political factions within a twelve-day notice period, closes the record four days thereafter and rejects without consideration plans with lower population deviations than its selected plan?

Does a court, in adopting a congressional redistricting plan that substantially shifts minority populations, violate a duty, recognized by other state and federal courts, when it fails to make an affirmative and substantial inquiry under the Voting Rights Act into the impacts of redistricting on minority populations?

May a state court, in adopting a congressional redistricting plan, ignore the policies of the last legislatively-enacted plan, when a federal court with concurrent jurisdiction over the same federal question would be required to defer to such policies under *White v. Weiser*?

May a state court, in adopting a congressional redistricting plan, treat concerns, such as minimizing the splitting of municipal boundaries and making districts compact, as general, *per se* justifications for higher-than-practicable population deviations, when, under *Karcher v. Daggett*, a federal court would entertain such factors as justifications only upon a proper showing and only for legislatively-enacted plans?

PARTIES TO THE PROCEEDINGS

In addition to the Petitioners[1] and Respondents named in the caption, the parties include:

Plaintiffs Below: Robert J. Mellow, Minority (Democrat) Leader of the Senate of Pennsylvania; J. William Lincoln, Minority (Democrat) Whip of the Senate of Pennsylvania; Leonard J. Bodack, Minority (Democrat) Caucus Chairman of the Senate of Pennsylvania; Michael J. O'Pake, Minority (Democrat) Caucus Secretary of the Senate of Pennsylvania; Patrick J. Stapleton, Minority (Democrat) Policy Committee Chairman of the Senate of Pennsylvania; Jeanette F. Reibman, Minority (Democrat) Caucus Administrator of the Senate of Pennsylvania; State Senator Vincent J. Fumo; and State Senator H. Craig Lewis, ("Plaintiffs").

Intervenors Below: Robert W. O'Donnell, Speaker (Democrat) of the Pennsylvania House of Representatives; H. William DeWeese, Majority (Democrat) Leader of the Pennsylvania House of Representatives; Allen G. Kukovich, Chairman of the Majority (Democrat) Policy Committee of the Pennsylvania House of Representatives; State Representative Dwight Evans; State Representative Frank Oliver; State Representative Thomas Michlovic; State Representative Gordon J. Linton; and State Representative Harold James, ("O'Donnell Intervenors");

Congressman Joseph M. McDade; Congressman John P. Murtha, ("McDade/Murtha Intervenors");

State Representative Robert L. Freemen; State Representative Karen A. Ritter; and State Representative Katherine McHale, ("Lehigh Valley Intervenors");

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[1] Petitioners include members of the Majority (Republican) Leadership of the Senate of Pennsylvania and the Minority (Republican) Leader of the Pennsylvania House of Representatives.

Grace L. Jarvis; Margaret Tricarico; Alexandra Makosky; and John H. Broujos, ("Broujos Intervenors");

State Representative Roy W. Cornell;

State Senator David J. Brightbill;

Albert Swann; the Frederick Douglas Society; and the Philadelphia Leadership Conference ("Swann Intervenors");

State Senator James C. Greenwood; Andrew L. Warren; Mark S. Schweiker; and Sandra A. Miller ("Greenwood Intervenors");

Edward J. Wilkes, Jr., Township of Upper Merion; Barbara Frailey; William M. Wall; William M. Keim, III; Justus C. Barber; Patricia Anne Buard; and Russell U. McLaughlin ("Upper Merion Intervenors");

Congressman Lucien C. Blackwell.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

To the Honorable, the Chief Justice and
Associate Justices of the Supreme Court
of the United States:

The Petitioners, F. Joseph Loeper, Robert C. Jubelirer, D. Michael Fisher, Charles Lemmond, Hank Salvatore, Noah Wenger and Matthew Ryan, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in this matter on March 10, 1992.

OPINIONS BELOW

The March 27, 1992, Opinion of the Supreme Court of Pennsylvania, in support of its March 10, 1992 Order, has not been officially reported at this time. The Order and Opinion are set out in the Appendix at A1.

JURISDICTION

The Pennsylvania Supreme Court's Order was entered on March 10, 1992.

The jurisdiction of this Court to review the decision of the Supreme Court of Pennsylvania is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved in this case are: U.S. Const. art. I, §2, cl. 3; U.S. Const. art. I, §4, cl. 1; U.S. Const. amend. XIV; U.S. Const. amend. XV; 42 U.S.C. §1973; Pa. Const. art. II, §16; Pa. Const. art. II, §17; 2 U.S.C. §2a; and 25 P.S. §3571. Pursuant to Supreme Court Rule 14.1(f), the texts of constitutional and statutory provisions involved in this case are set out in the Appendix at A108.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Plaintiff, Democrat State Senators commenced this case by filing a complaint and a motion for a preliminary injunction in the Commonwealth Court of Pennsylvania on January 28, 1992, docketed at No. 25 M.D. 1992. The complaint requested the court: (1) to declare unconstitutional section 1802-A of the Pennsylvania Election Code, Act of June 3, 1937, *as amended*, 25 P.S. §3571, the statutory provision enacted in 1982 detailing congressional districts; (2) to enjoin implementation of the Pennsylvania primary election schedule; and (3) to adopt a congressional redistricting plan if the General Assembly failed to do so by February 11, 1922.

On January 30, 1992, Senior Judge Francis A. Barry of the Commonwealth Court issued an order enjoining the Respondents, state election officials, from implementing the election schedule and requiring any person wishing to submit proposed congressional reapportionment plans to intervene in the action and to submit proposed congressional redistricting plans to the Commonwealth Court by February 11, 1992 ("Preliminary Injunction Order"). (Appendix at A100.) By order dated February 12, 1992, Commonwealth Court President Judge David W. Craig set a hearing to consider the congressional redistricting plans submitted, which was to begin at 10 A.M. on February 13, 1992 and continue

through February 15, 1992. (Appendix at A102.) Subsequent to the hearing, Petitioners (referred to in the state court proceedings as "Loeper Intervenors") filed an answer to the complaint, raising the issues of: (1) compliance of any redistricting plan with the Voting Rights Act; (2) the necessity for a full and fair hearing; and (3) the necessity of fully considering all plans tendered to the court. (Appendix at A149.)

On February 13, 1992, the Pennsylvania Supreme Court issued a *per curiam* order assuming plenary jurisdiction of the action, appointing President Judge Craig a master, and ordering him to file a master's report by February 26, 1992. (Appendix at A106.) President Judge Craig filed the Master's Report on February 24, 1992. (The Master's Report is appended to the March 26, 1992 opinion of the Supreme Court of Pennsylvania, Appendix at A16.) On March 3, 1992, the Pennsylvania Supreme Court set March 7, 1992 for oral argument on the exceptions to the Master's Report. (Appendix at A107.) The Pennsylvania Supreme Court issued an order accepting the Recommendation of the Master on March 10, 1992 and filed its opinion in support thereof on March 26, 1992. (The March 10 order, Appendix at A72, is appended to the March 26, 1992 opinion, Appendix at A1.)

There were concurrent related proceedings in the United States District Courts for the Middle and Eastern Districts of Pennsylvania, where three separate actions concerning Pennsylvania's congressional reapportionment were filed. The first two actions (Nerch v. Mitchell, Middle District Docket No. 3:CV-92-95, and Barness v. Mitchell, Eastern District Docket No. 92-CV-593, which was transferred to the Middle District and initially docketed at 1:CV-92-0155) were filed on January 29, 1992. The third action (Ryan v. Mitchell, Middle District Docket No. 1:92-CV-0166) was filed February 14, 1992. These actions were assigned to the same three-judge panel, were consolidated in the Middle District at Docket No. 3:92-CV-95, captioned Nerch v. Mitchell, were stayed pending action by the Pennsylvania Supreme Court, and were heard in a trial on the merits on March 29, 30, and

31, 1992. At the trial the three-judge panel heard evidence relating to the validity of the plan being implemented by the respondent state election officials pursuant to the order of the state supreme court. The panel has not yet decided the case.

B. FACTUAL HISTORY

The last congressional redistricting in the Commonwealth of Pennsylvania, enacted by its General Assembly in 1982, provided for twenty-three congressional districts. See section 1802-A of the Pennsylvania Election Code, 25 P.S. §3571. Based on 1990 census data, the Clerk of the House of Representatives of the United States, in December 1990, issued a Certificate of Entitlement to the Secretary of the Commonwealth, which reduced Pennsylvania from twenty-three to twenty-one congressional districts. The census data also showed that changes of population since the 1980 census had resulted in congressional districts with populations varying as much as 19.8%.

The General Assembly of the Commonwealth was therefore required to redistrict the Commonwealth to reflect the decrease in congressional districts and the changes in population. The General Assembly has not yet enacted a redistricting plan. A plan with zero deviation from the ideal, i.e. with districts of equal population, would have 565,793 people in each district.

On February 13, 1992, at the beginning of the hearing and before taking evidence, Judge Craig stated he would consider three proposed plans from the Mellow Plaintiffs (Mellow Plans 1, 2, & 3) (one of which was later withdrawn), two proposed plans from O'Donnell Intervenors (O'Donnell Plans A & B), one plan from McDade/Murtha Intervenors (McDade/Murtha Plan), and one plan from Loeper Intervenors (Loeper Original Plan). The Loeper Intervenors were also permitted at that time to proceed at the hearing with evidence on an amended version of their plan (Loeper Amended Plan), that had lower population deviation than the plan ultimately adopted by the court. A plan with near zero population

deviation (.0000265% maximum deviation; .0000025% average deviation), offered by Petitioner Ryan and State Representative Cornell was excluded at the outset because it was submitted to the court one day after the February 11, 1992 deadline established in the court's order twelve days earlier. (Transcript, Vol. 2-B at 129-30, 132-33, Appendix at A136.)

Testimony on the various plans was heard over the next three days. The Master also heard evidence from groups with concerns about the impact of reapportionment on specific regions of the Commonwealth.

At the end of the hearing, on Saturday, February 15, 1992, Judge Craig ruled that the evidence submitted regarding the Loeper Amended Plan, which had lower population deviation than the plan selected by the court (*See* Appendix at A147), would be used solely for the purpose of showing the deficiencies in the Loeper Original Plan. (Transcript, Vol. 3 at 137-44, Appendix at A136.) Plaintiffs, whose plan was ultimately selected, sought to introduce expert testimony concerning the voting rights impact of their plan but Judge Craig refused to permit the witness to be called. (Transcript, Vol. 3 at 209-10, 214, 222, Appendix at A142.) No voting rights experts testified on any of the plans accepted for consideration by the master.

Judge Craig stated that his report would recommend adoption by the Pennsylvania Supreme Court of one of the admitted plans and that he would not attempt to design a plan. (Transcript, Vol. 2-A at 8-9, Appendix at A135.)

Judge Craig issued his Master's Report on February 24, 1992. In their exceptions (Appendix at A150), Loeper Intervenors raised the issues of: (1) a lack of a full and fair hearing due to the exclusion of plans (exceptions 1-3 and 12); (2) the failure of the Master to ensure that the adopted plan complied with the Voting Rights Act (exceptions 5-6); and (3) use of an improper standard for selecting a court adopted plan (exceptions 7-10). These issues

were also raised by Loeper Intervenors at oral argument before the Pennsylvania Supreme Court on March 7, 1992.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court of Pennsylvania adopted a congressional redistricting plan in a manner that deprived the parties of a full and fair hearing, that failed to protect the rights of the public, that is in conflict with the duty recognized by other courts, and that presents an important question regarding the proper exercise of a court's equity powers in a case involving fundamental constitutional rights.

In adopting a statewide congressional redistricting plan, the Supreme Court of Pennsylvania refused to consider any plan not filed during a twelve-day period set by a preliminary injunction order. The court refused to consider even amendments to filed plans that would have improved them. The court also refused to consider, through its Master or otherwise, drafting any alternative plans of its own.

As a result, the redistricting plans considered by the court were limited to two plans submitted by the Mellow Plaintiffs, who are members of the State Senate Democrat Caucus, two plans submitted by State House of Representatives Democrat Caucus members, one plan submitted by Republican State Senators (Petitioners here) and one plan submitted by certain incumbent Congressmen.

Although Petitioners were not parties at the time the Preliminary Injunction Order set a twelve-day deadline for filing plans, they managed to meet the deadline by filing a plan they had introduced in the State Senate. They were, however, penalized at the conclusion of the hearing for amending their plan to reduce the

population deviation to .00954 percent maximum deviation, which is lower than the maximum deviation of the plan selected by the court. (See Appendix at A147.) The Supreme Court of Pennsylvania did not disturb the ruling of its Master that this amended plan would be used "for the sole purpose of showing the deficiencies in the [Petitioners'] original plan." (Appendix at A140.) The superior amended plan offered by Petitioners was not even used by the court to compare the merits or deficiencies of the other plans accepted for consideration, but was used solely to penalize Petitioners.

In addition to rigidly enforcing the 12-day window for filing plans, the state court accelerated and compressed to an extraordinary degree the proceedings for consideration of plans. One day after the deadline for filing plans, the court set a date for a hearing on the plans. Two days after the deadline for filing plans, the hearing began. The parties were severely limited in the number of witnesses they could call. Although each party was allowed to present evidence on the merits of its plan, the parties did not have an adequate opportunity to study competing plans, much less to develop evidence that would test the assumptions and contentions of competing plans. The court refused to allow rebuttal witnesses. Four days after the deadline for filing plans, the hearing ended and the record was closed. The court did not attempt to modify any of the submitted plans even slightly, or to correct errors, much less attempt to draft its own plan.

The Pennsylvania Supreme Court did not proceed "in a manner 'free from any taint of arbitrariness or discrimination'" as required by this Court. *Connor v. Finch*, 431 U.S. 407, 415 (1977) (quoting *Roman v. Sincock*, 377 U.S. 695, 710 (1964)). Nor did it assume any responsibility to ensure it obtained sufficient information to make a decision that the plan adopted met all constitutional, statutory and caselaw requirements.

The arbitrary exclusion of other options, and the haste with which it moved, practically assured that the Supreme Court of

Pennsylvania would not adopt the best plan that could be drawn for the Commonwealth. It also assured that the only players of substance in determining the outcome of redistricting would be, at most, a few political factions that had been aware of, or planning for, litigation. No responsibility was assumed to protect the rights of non-party voters. There was neither a full nor a fair hearing on a matter of great public importance.

The Supreme Court of Pennsylvania's arbitrary constriction of its options is contrary to the view of other state and federal courts that full and fair hearings, with ample opportunity for public participation, should be provided when a court adopts a plan.

The California Supreme Court, for example, recently adopted statewide congressional and legislative redistricting plans after a four-month process that included public hearings, which commenced within thirty days after the appointment of masters, and a thirty-day period of briefing and public comment following the filing of the masters' recommendations. *See Wilson v. Eu ("Wilson I")*, 816 P.2d 1306, 1307 (Cal. 1991). During this process, twenty-two (22) statewide congressional reapportionment plans were submitted to the California Supreme Court's masters. The California Supreme Court rejected all of these plans and accepted one drafted by its masters. *Wilson v. Eu ("Wilson II")*, 823 P.2d 545 (Cal. 1992). The foundation of this careful process is the California Supreme Court's recognition that, in reapportionment cases, it has not just a duty of fairness to the parties but a constitutional "duty to insure the electorate equal protection of the laws" that can only be fulfilled by affording all interested parties an opportunity to be heard. *Legislature v. Reinecke*, 492 P.2d 385, 389 (1972).

The three-judge panel that recently adopted a congressional redistricting plan for the state of Illinois, in *Hastert v. State Board of Elections*, 717 F.Supp. 634 (N.D. Ill. 1991), also chose to pursue a course of action that encouraged broad participation and the development of proposed plans that met constitutional and statutory

requirements.[2] The *Hastert* court consolidated three reapportionment actions and ordered publication, in six daily newspapers, of a notice which invited anyone desiring to participate to file a petition to intervene within twenty-eight days. The court later consolidated a fourth reapportionment action and proposed plan, filed a day after its intervention deadline, with the other actions. Discovery was allowed for more than a month afterwards. The many submitted plans were amended significantly before trial, eliminating major areas of conflict and leaving two proposed plans before the court, one of which was numerically precise.

The Supreme Court of Texas recently vacated a redistricting order entered by a lower court where a sufficiently open and public process was lacking for consideration of the public interest in finding the optimum redistricting plan. *Terrazas v. Ramirez*, No. D-1817, 1991 Tex. LEXIS 160 (Tex. Dec. 17, 1991). The court explained the duty of the trial court in dealing with apportionment cases:

> Apportionment affects every person in the state, yet only a very few parties can be involved in any lawsuit challenging redistricting. The trial court must attempt to consider the interest, not only of the parties in the case, but of others who are not present.

Id., at *20-21.

The Supreme Court of Texas analogized the reapportionment lawsuit with other types of cases, such as class action settlements and school desegregation cases, where "the individuals or groups to be protected are those who are not

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[2] The Circuit Courts of Appeals do not have jurisdiction over statewide reapportionment cases, which are heard by three-judge district court panels, with appeals directly to this Court. 28 U.S.C. §2284(a).

participants in the litigation but whose rights and interests are affected thereby." *Id.*, at *22.

When approving class action settlements, "the district court acts as a fiduciary who must serve as a guardian of the rights of absent class members. . . . The court cannot accept a settlement that the proponents have not shown to be fair, reasonable, and adequate." *Grunin v. International House of Pancakes*, 513 F.2d 114, 125 (8th Cir. 1975), *cert. denied*, 423 U.S. 864 (1975) (citations omitted). As the Third Circuit recognized in *Grish v. Jepsen*, 521 F.2d 153 (3d Cir. 1975), when reviewing a class action settlement approved by the trial court:

> 'It is essential . . . that a reviewing court have some basis for distinguishing between well-reasoned conclusions arrived at after a comprehensive consideration of all relevant factors, and mere boiler plate approval phrased in appropriate language but unsupported by evaluation of the facts or analysis of the law.'

Id. at 159 (quoting *Protective Committee v. Anderson*, 390 U.S. 414, 434 (1968)). The Third Circuit held that "the district court did not live up to its fiduciary responsibility, as guardian of the rights of the absentee class members in approving the settlement based upon the inadequate record before it." *Id.* at 157.

The haste with which the state court conducted and concluded the hearings, excluding any effort by the parties to improve or to expand its options, was also inconsistent with due process. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), this Court stated that notice "must afford a reasonable time for those interested to make their appearance." 339 U.S. at 314. The decision in *Mullane* was relied upon by the Third Circuit in *Greenfield v. Villager Industries*, 483 F.2d 824 (3d Cir. 1973), to reject a thirty day proof of claim period as insufficient.

Pro forma gestures will not suffice for notice which affords an adequate opportunity to respond and to prepare. *Id.* at 834.

As the Supreme Court of Texas recognized, reapportionment cases have a much broader effect than merely resolving the conflict between the parties before the court. Therefore, a fiduciary duty, similar to that imposed on courts considering class action settlements and school desegregation cases, should be imposed on courts dealing with reapportionment cases. The conduct of the state court proceedings in this case were inconsistent with such a duty. The duty should be no less rigorous for a state court than for a federal court since fundamental federal constitutional rights are at stake.

This Court should consider whether any court entertaining the adoption of a reapportionment plan must take affirmative steps to obtain all information needed to assure that the plan complies with constitutional, statutory and caselaw requirements. This Court should consider whether it is sufficient for a court, whether state or federal, to play only the role of a referee, allowing competing parties to limit a court's options by the way they frame their proposals. Petitioners suggest that, since a court must do more in mere commercial class action litigation, it is inconceivable that a court may be less protective in cases involving constitutional rights of the public.

II. The Supreme Court of Pennsylvania's failure to make an affirmative and substantial inquiry into the impacts of redistricting under the Voting Rights Act conflicts with the duty recognized by other courts and presents important questions of federal law which have not been, but should be, settled by this court.

The Supreme Court of Pennsylvania adopted a plan that: (1) reduced the African-American population percentage in

Pennsylvania's only previous majority-minority congressional district (i.e., district in which African-Americans were an effective majority of the voters) by 19 percentage points; (2) increased the African-American population in an adjacent congressional district, so that, for the first time, a second congressional district in Pennsylvania would have more than a 50 percent African-American population; and (3) diluted the African-American population in Pittsburgh's Fourteenth Congressional District from its previous level of approximately 23 percent to approximately 17 percent. Each of these three actions was handled in a manner that conflicts with the duty recognized by other courts of studying the impact of such drastic shifts.

The retrogression of African-Americans in Philadelphia's Second Congressional District was done over the opposition of the incumbent African-American Congressman. (Appendix at A35.) The court reduced the African-American population in this district below the 65 percent level that has been generally accepted by the federal courts as a benchmark or guideline for the effectiveness of minority representation. *Ketchum v. Byrne*, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). No expert testimony was heard regarding the impact on the ability of African-American voters in this district to continue to have an opportunity to elect a congressman of their choice, as is their right under section 2 of the Voting Rights Act, 42 U.S.C. §1973. In fact, Mellow Plaintiffs themselves sought to offer testimony from an expert witness on this issue but were denied permission by the Master, who rigidly limited evidence at the hearing. (Appendix at A136-37, A142-46.)

Other courts that have addressed setting an appropriate minority population percentage for a district have made a point of obtaining extensive testimony and both statistical and expert evidence, that specifically addresses impacts within the configuration of the proposed districts. For example, in *Burton v. Sheheen*, 1992 W.L. 106354 (D.S.C. May 1, 1992), a three-judge court heard extensive expert testimony on voting rights issues from

experts with respect to the section 2 preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). This testimony consisted, in part, of testimony of racial polarization based on extreme case analysis and bivariate ecological regression, the type of expert analysis on which the Court relied in *Gingles*. The court, noting that it was not deciding whether the creation of a majority-minority district was mandated, adopted a congressional redistricting plan containing such a district, explaining:

> The application of [section] 2 to this case has its genesis in the admonition of the Supreme Court in Connor v. Finch, 431 U.S. 407, 425 (1977) that 'it is imperative for the District Court, in drawing up a new plan, to make every effort not only to comply with the established constitutional standards, but also to allay suspicions and avoid the creation of concerns that might lead to new constitutional challenges.' It would be incongruous for the court to adopt a plan which did not comport with the standards and guidelines of §2.

1992 W.L. 106354 at *15.

The Pennsylvania Supreme Court's creation of the second African-American majority district in Philadelphia was based on its perception that "[w]hen possible, an increase in the number of minority-in-the-majority districts is constitutionally required," citing *Thornburg v. Gingles*, 478 U.S. 30 (1986). (Appendix at A34.) The Pennsylvania Supreme Court received no evidence on whether African-Americans in this district suffered any impairment of their opportunity to elect a representative of their choice. The court likewise heard no evidence on whether African-American voters in a district with this configuration would be an effective majority as

opposed to a numeric majority.[3] The lack of factual inquiry, though, would be immaterial if the Pennsylvania Supreme Court's view of federal law were correct.

The Pennsylvania Supreme Court's interpretation of federal law on this issue, however, is in conflict with that of the United States District Court for the Northern District of Ohio, where a three-judge panel recently held that the Voting Rights Act and federal precedent do not dictate such a *per se* requirement. *Quilter v. Voinovich*, No. 91CV-2219 (N.D. Ohio Jan. 31, 1992), *probable jurisdiction noted*, 1992 U.S. LEXIS 3271 (No. 91-1618, June 1, 1992). In *Quilter* a legislatively enacted plan was overturned by a panel that found no factual predicate for the creation of majority-minority districts.

In Pittsburgh's Fourteenth Congressional District, the Pennsylvania Supreme Court reduced the African-American population by one-fourth its former weight in the district, again without any affirmative inquiry into the consequences. The Court did not look at whether a cohesive minority voting group existed, whether it had achieved any influence in its district, whether its

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[3] As explained by the Seventh Circuit in *Ketchum*, 740 F.2d at 1415, experience has shown that a mere numeric majority may not protect minority voting rights:

> A guideline of 65% of total population has been adopted and maintained for years by the Department of Justice and by reapportionment experts and has been specifically approved by the Supreme Court in circumstances comparable to those before us as representing the proportion of minority population reasonably required to ensure minorities a fair opportunity to elect a candidate of their choice. This figure is derived by augmenting a simple majority with an additional 5% for young population, 5% for low voter registration and 5% for low voter turn-out, for a total increment of 15%. This leads to a total target figure of 65% of total population.

influence would be diminished or destroyed, or whether racial block voting affected the group's influence.

As acknowledged by the California Supreme Court in *Wilson II*, 823 P.2d at 567-68, there is a split among the courts on the question of whether there can be a Voting Rights Act claim arising from a single-member district where a minority group does not constitute a majority of the population. The three-judge district court in *Armour v. Ohio*, 775 F.Supp. 1044 (N.D. Ohio 1991), recognized that influence districts can exist and deserve consideration under the Voting Rights Act. The three-judge district court in *Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D. Ill. 1991), disagreed with the *Armour* court, a position with which the Pennsylvania Supreme Court has tacitly aligned itself. *Also contra* on this issue is *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

The California Supreme Court resolved the issue for itself by assuming that all sizable minorities were cohesive as voting groups and by maximizing minority representation in every congressional district possible. *Wilson II*, 823 P.2d at 567-68.[4] By taking this approach, the California Supreme Court in *Wilson II* "endeavored to protect the combined group's voting potential in accordance with section 2 [of the Voting Rights Act]." 823 P.2d at 867. Pennsylvania's approach is in conflict with this.

Whether the formation of minority influence districts should be the subject of an affirmative inquiry under the Voting Rights Act by a court adopting a redistricting plan is an important question that this court should resolve in light of these ongoing differences of interpretation, which all focus on what this court

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[4] The California Supreme Court approved the Report and Recommendations of Special Masters on Reapportionment with regard to the Masters' interpretation of the Voting Rights Act and appended the Masters' Report to the Court's opinion. *See* 823 P.2d at 559.

meant in *Thornburg v. Gingles*, 478 U.S. 30 (1986), as interpreted by *Chisom v. Roemer*, ___ U.S. ___, 111 S.Ct. 2354, 115 L.Ed.2d 348 (1991).[5]

For all the Pennsylvania congressional districts with recognized minority populations, the common issue presented by the Pennsylvania Supreme Court's approach to redistricting is this: when a legislature has failed to enact a constitutional plan, must the court, in adopting its own plan, conduct an affirmative and substantial inquiry into the impact of redistricting on minority populations? The question is one of obvious public importance. As illustrated above, it is also one that calls for an answer from this court because of the disparate approaches in state and federal courts.

III. The Pennsylvania Supreme Court, in adopting a congressional redistricting plan, ignored the policies of the last legislatively-enacted plan, in a manner which is in conflict with an applicable decision of this court and contrary to important and fundamental public interests.

The Pennsylvania Supreme Court's Opinion, and the Master's Report, lack any consideration of the last legislatively-enacted plan in Pennsylvania. The court made no effort to determine the policies of that plan and to find a plan fit for court adoption that both protected voting rights and best conformed to the last expression of the will of Pennsylvania's legislature. This is in direct conflict with the decision of this court in *White v. Weiser*, 412 U.S. 783 (1973).

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[5] Petitioners are not asking the Court, though, to decide whether a minority influence district, or the lack of one, can give rise to a cause of action under section 2 of the Voting Rights Act.

In *White*, this Court held that the district court had appropriately concluded that the legislatively-enacted congressional redistricting plan violated the one man, one vote rule, but that the district court, in adopting its own congressional reapportionment plan, erred in not honoring valid state policies embodied in the unconstitutional enactment. The district court should have chosen a plan that contained the same basic district configurations as the unconstitutional apportionment statute while remedying the impermissible population variations. In reaching this conclusion, this Court noted that, while the plan chosen by the district court might have contained districts that were "more compact," the district court could not ignore "whatever state goals were embodied" in the unconstitutional reapportionment statute and which were kept in the proposed plan with the same basic district configurations. 412 U.S. at 796. This Court further stated: "'[T]he District Court erred in so broadly brushing aside state apportionment policy without solid constitutional or equitable grounds for doing so.'" *Id.* (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)).

The Supreme Court of Pennsylvania did exactly what this court found to be error in *White*. The court ignored the last legislatively-enacted expression of state policy with respect to congressional reapportionment by failing to consider which of the plans before it was most consistent with the existing congressional reapportionment statute.

The Court's failure is illustrated by the changes it made to the congressional districts in and around the City of Pittsburgh. Under the statute, the Fourteenth Congressional District included the City of Pittsburgh and certain suburbs on its east side that have substantial African-American populations and which are not affluent. The Eighteenth Congressional District, under the same statute, surrounded the city in a horseshoe shape on the north, west and south sides. The communities in this horseshoe are largely white, affluent bedroom communities. The Supreme Court of Pennsylvania itself recognized that these suburban communities on

the north, west and south constituted a community of interests that was different than that of the city and its eastern suburbs. (Master's Report, Finding of Fact 28, Appendix at A43.)

What the Supreme Court of Pennsylvania failed to acknowledge was that this community of interests was recognized, and embodied as a legislative policy, in the previous redistricting statute. The court's plan broke up the horseshoe-shaped Eighteenth District and distributed it among four other districts. The inner-city district was combined with the northern suburbs. The western suburbs were combined with a district that extended outside the metropolitan area into other counties, and the African-American populations in the eastern suburbs joined not with the city but with, among other areas, affluent white suburbs in the northeast and south of the city.

As in *White*, there were plans proffered to the Supreme Court of Pennsylvania that were more consistent with the configurations of the last legislatively-enacted plan. The Loeper Amended Plan, for example, proffered by Petitioners, would have preserved both the horseshoe-shaped configuration of the Eighteenth District in the suburbs and maintained the African-American population of the Fourteenth District by joining the city and certain of its eastern suburbs. Like the plan initially rejected by the district court in *White*, it also had a lower population deviation than the Court's selected plan.

The decision of the Supreme Court of Pennsylvania stands in defiance of an important principle of federal law. Under article 1, section 4 of the United States Constitution, the prerogative of redistricting is given to the legislatures of the states, subject to congressional regulation. This Court has welcomed state courts to play an active role in redistricting litigation. *See e.g., Scott v. Germano*, 381 U.S. 407 (1965). It is very important, therefore, as state courts become more active, that they apply, and be held to, the same rigorous standards that prevail in federal district courts.

When a state court, as here, acts as a court of general jurisdiction in an area where its jurisdiction is concurrent with that of the federal courts the same standard should apply.[6] It should no more invent policies for the state in congressional redistricting than a federal court. This Court should act to assure that federal questions are addressed in a consistent fashion, regardless of whether the litigation is in federal or state court.

IV. The Pennsylvania Supreme Court erred in applying this court's decision in *Karcher v. Daggett*, 462 U.S. 725 (1983), in a manner that is an egregious departure from this court's guidance and that has important public consequences for Pennsylvanians.

In *Karcher*, this court articulated a standard by which a court must review a legislatively-enacted redistricting plan. The standard bifurcates the burden of proof. First, the plaintiff must demonstrate that the plan does not achieve the lowest practicable population deviation. Then, if that is established, the burden of proof shifts to the defendant, typically the state election officials, to demonstrate that "each significant variance between districts was necessary to achieve some legitimate goal." 462 U.S. at 731. As the court stated in *Karcher*:

> White v. Weiser demonstrates that we are willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even

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[6] Under article II, section 17 of the Pennsylvania Constitution (Appendix at A110), the Pennsylvania Supreme Court has a role in redistricting the state legislature that is quasi-executive and quasi-legislative as well as judicial. The Pennsylvania Constitution, however, is silent on congressional redistricting. The Pennsylvania Supreme Court was acting in this case solely as a court of general jurisdiction concurrent with that of the federal courts in congressional redistricting matters.

> if they require small differences in the population of congressional districts. . . . Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent representatives.

Id. at 740 (citations omitted).

The Supreme Court of Pennsylvania erred by assuming that the legislative policies that this Court said "might justify" some variance were *per se* justifications that would overcome the deficiencies of a plan with less than ideal population deviation. The Pennsylvania Supreme Court's opinion merely cites the *Karcher* policies without stating why any policy, such as respecting municipal boundaries, is of any importance in Pennsylvania for congressional districts. The Pennsylvania Supreme Court also overlooked the fact that *Karcher* was referring to legislative policies rather than judicial policies. Such policies may be embodied in a state constitution, a previously enacted redistricting statute or in other state statutes. No such references were cited by Pennsylvania's Supreme Court.

Furthermore, *Karcher* requires that any stated justification for a population variance must have been consistently and uniformly applied throughout the state. The justifications given by the Pennsylvania Supreme Court, in addition to not being identified as state legislative policy, were also not consistently and uniformly applied.

The court, for example, attached importance to the avoidance of splitting political subdivisions. However, a review of the court's plan (Appendix at A76) shows that while there were no municipal splits in western Pennsylvania, there were numerous

municipal splits in eastern Pennsylvania. No explanation for the failure to apply this principle uniformly was given by the court.

A desire "to preserve communities of interest" (Appendix at A7) was another purported justification for population deviations that was not consistently and uniformly applied. The Master found that the City of Pittsburgh "has more in common with the close-in easterly suburbs and in the Monongahela Valley's former steelmaking areas than with the suburbs in the north, west and south." (Master's Report, Finding of Fact 28, Appendix at A43). However, as discussed above, in Part III of this Petition, the court's plan disregarded its own findings and split these recognized communities of interest. (*See* description and map of court adopted plan, Appendix at A69-70, A76-89.) This is in stark contrast to the plan's treatment of rural North Middleton Township. Other plans considered by the court placed the township in the Ninth Congressional District. The court chose to keep the township in the Nineteenth District because of evidence supporting the "affinity of North Middletown Township . . . with other communities in the Nineteenth Congressional District, rather than in the Ninth." (Master's Report, Finding of Fact No. 23, Appendix at A39.)

The Pennsylvania Supreme Court's misinterpretation of *Karcher* is compounded by the fact that *Karcher* does not apply at all. The court failed to perceive that *Karcher* applies to the review by a court of a legislatively enacted plan, while *White v. Weiser* sets the standard by which a court should proceed in adopting its own plan where a legislature has failed to act. Observing the distinction between *Karcher* and *White* is important since it is the only way to achieve the due deference to legislative policy that this Court has called for in all redistricting cases. Since fundamental federal constitutional rights are involved, it is also important that state courts adhere to the same standard as the federal courts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to the Supreme Court of Pennsylvania.

June 8, 1992

Respectfully submitted,

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91-2015

Supreme Court, U.S.
FILED
JUN 8 1992
OFFICE OF THE CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1991

F. JOSEPH LOEPER, ROBERT C. JUBELIRER, D. MICHAEL FISHER, CHARLES LEMMOND, HANK SALVATORE NOAH WENGER AND MATTHEW RYAN
Petitioners,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commission, Elections, and Legislation, Department of State, et al.
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

APPENDIX

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ORDERS, OPINIONS AND RULINGS

J-57-1992

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ROBERT J. MELLOW, Senator, 22nd District, J. WILLIAM LINCOLN, Senato,r 32nd District, LEONARD J. BODACK, Senator, 38th District, MICHAEL J. O'PAKE, Senator, 11th District, PATRICK J. STAPLETON, Senator, 41st District, JEANETTE F. REIBMAN, Senator, 18th District, VINCENT J. FUMO, Senator, 1st District, and H. CRAIG LEWIS, Senator, 6th District, Individually and in their official capacities,	:	*No. 7 Middle District Miscellaneous Dkt. 1992*
Appellants	:	
v.	:	
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, in their official capacities only,	:	
Appellees	:	*ARGUED: March 7, 1992*

OPINION OF THE COURT

MR. JUSTICE PAPADAKOS ***FILED MARCH 26, 1992***

This case involves the redistricting of Pennsylvania's seats in the United States House of Representatives. After the 1990 census was taken, the Clerk of the United States Congress informed the Pennsylvania Secretary of State that Pennsylvania was henceforth only entitled to have twenty-one (21) seats in the United States House of Representatives, a net loss of two (2) seats or districts. From early 1991 to the present, the Pennsylvania Legislature failed to enact a 21-district reapportionment plan. On January 28, 1992, the first day for circulating nomination petitions for election to Congress (under 25 P.S. §2868), Appellants (eight Democratic State Senators) filed an equity action in the Commonwealth Court, invoking that Court's original jurisdiction against Appellees (certain State election officials). Noting that February 18, 1992, the last day to file nomination petitions, was fast approaching, Plaintiff-Appellants asked the Commonwealth Court to declare the existing congressional apportionment law (25 P.S. §3571) unconstitutional; to enjoin the implementation of the official congressional election schedule until a valid plan could be adopted; and to adopt a valid reapportionment plan if the Legislature was unable to do so. Senior Judge Barry of the Commonwealth Court held a prompt hearing and, on January 30, 1992, he granted a preliminary injunction on the basis that the existing 23-seat apportionment plan was unconstitutional, enjoining the implementation of the then present schedule for electing members of Congress in Pennsylvania. Judge Barry's order required all parties and intervenors, if any, to submit their proposed reapportionment plans to the Commonwealth Court no later than February 11, 1992. His order also provided notice that the Court would select a plan if the Legislature failed to act by February 11, 1992.

As of February 12, 1992, the Legislature had failed to enact a reapportionment plan. Hence, by order of that date, the

Commonwealth Court ordered final hearings to begin the next day, February 13, 1992, to receive evidence and to consider all proposed plans that had been timely filed on or before February 11, 1992. Plaintiff-Appellants presented three plans, styled Plaintiffs' Nos. 1, 2 and 3. Plaintiffs' No. 3 was later withdrawn. The Attorney General intervened and additional parties, a number of whom submitted plans of their own, were also granted intervenor status to represent the interests of specific counties or other geographical areas around the State or to protect the voting rights of African-Americans in various congressional districts. Additional details concerning these plans and other issues raised by some intervenors are addressed below.

Meanwhile, Plaintiff-Appellants applied to this Court to take plenary jurisdiction of the matter. By order of February 13, 1992, this Court exercised such plenary jurisdiction. We designated President Judge David W. Craig of the Commonwealth Court as Master to conduct hearings and report to us not later than February 26, 1992. The hearings before the Commonwealth Court began on February 13 and were concluded on February 15. Judge Craig's "Findings, Recommended Decision and Form of Order," along with a proposed election schedule revision were filed with this Court on February 24, 1992, and a copy thereof is attached to this Opinion as Appendix A. Subsequently, exceptions to Judge Craig's Findings and briefs were filed with this Court and oral arguments were held on Saturday, March 7, 1992, in Pittsburgh. We issued a Per Curiam Order on March 10, 1992, adopting Judge Craig's Findings, Recommended Decision and Form of Order, along with our "Revised Election Calendar" and dismissing all exceptions thereto. A copy of our Order is attached hereto as Appendix B. This Opinion explains our disposition of this matter.

Judge Craig's Recommended Decision (Appendix A) compares and evaluates the six different plans timely submitted to him. The plans scrutinized were Plaintiffs' No. 1 and No. 2; two plans styled O'Donnell A and O'Donnell B (both submitted by

Speaker of the House Robert W. O'Donnell and seven other Democratic members of the Pennsylvania House of Representatives); the "Murtha-McDade" Plan (a "bi-partisan" plan submitted by Congressmen John P. Murtha, Joseph M. McDade and nine other incumbent members of Pennsylvania's congressional delegation); and a plan styled "Loeper 1" (submitted by Senate Majority Leader F. Joseph Loeper and five other Republican State Senators). Plans filed after the February 11 deadline, including the "Ryan-Cornell" plan submitted by two Republican members of the Pennsylvania House - Matthew J. Ryan and Roy W. Cornell, and an amended version of the Loeper plan ("Loeper 2") were properly not considered by Judge Craig. As he pointed out, the various parties had many months to formulate their plans, and to have allowed consideration of plans, amendments or revisions submitted late would have created the potential of endless proceedings. Thus, Judge Craig was absolutely correct in adhering to the pre-announced deadline of February 11.

Judge Craig correctly notes that federal law requires, primarily, that districts be equal in population to the greatest practical extent. Slight departures from mathematical perfection have been justified by the federal courts only to advance the cause of equality in the following respects: avoiding fragmentation of local government territories and the splitting of election precincts; effectuating adequate representation of a minority group; creating compact and contiguous districts; maintaining relationships of shared community interests; and not unduly departing from the useful familiarity of existing districts. Finding of Fact No. 16 in Judge Craig's Recommended Decision (see Appendix A) is a table with nine columns summarizing the six competing plans.

After a detailed analysis of regional concerns, Judge Craig recommended approval of Plaintiffs' Plan No. 2 because it: (1) has a low maximum population deviation; (2) is consistent with minimal splitting of precincts; (3) achieves an enlarged number of two congressional districts with a majority of African-American population; and (4) comes closest to implementing the community-

of-interest factors in those regions across the State which have identified them. While the Murtha-McDade Plan achieved remarkable mathematical exactitude, it splits twenty-two (22) election precincts and twenty-seven (27) local governments. Next in mathematical exactitude, and both meeting constitutional standards, are O'Donnell Plan B and Plaintiffs' No. 2, respectively. Unlike O'Donnell Plan B, Plaintiffs' Plans No. 1 and 2 would achieve the goal of forming two black majority congressional districts, thought possible and, hence, constitutionally necessary in light of Pennsylvania's 9% African-American population, by increasing the African-American population in the- First Congressional District to 52.4% while maintaining a strong majority African-American population of 62.242% in the Second Congressional District.

Numerous exceptions to Judge Craig's report, and submissions from other interested persons objecting to aspects of the report, have been filed with this Court. They are set forth in full in Appendix C to this Opinion. We have consolidated them into the various legal issues raised and we will now address said issues.

I. Population Deviations

A number of exceptions filed contend that Judge Craig erred in recommending Plaintiffs' Plan No. 2 because that plan has a higher maximum total deviation than two other plans. In Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964), the United States Supreme Court held that congressional districts within a state must have equal numbers of people based on the "one man, one vote" principle. 376 U.S. at 7-8. While Kirkpatrick v. Preisler, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969), stands for mathematical absolutism in congressional reapportionment, the court has since conceded that "precise mathematical equality ... may be impossible to achieve in an imperfect world...." Karcher v. Daggett, 462 U.S. 725, 730, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983). Consequently, the Constitution

requires only that "districts be apportioned to achieve population equality 'as nearly as is practicable.'" Karcher, supra, 462 U.S. at 730.

To determine whether the maximum total deviation of a plan satisfies the "one person, one vote" standard, the United States Supreme Court has established a two-part test. Karcher, supra, 462 U.S. at 730. First, the party challenging a redistricting plan must show that "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." Karcher, supra, 462 U.S. at 730. As Judge Craig correctly stated, however, "a plan is not per se unconstitutional just because a smaller population deviation could be achieved." Recommended Decision at 12; see also, Karcher, supra, 462 U.S. at 740 ("By itself, ... [appellees' showing that the Feldman Plan did not come as nearly as practicable to population equality] does not establish that the Feldman Plan is unconstitutional.") Rather, the existence of plans with smaller deviations simply obligates a court to apply the second part of the test, i.e., to ask whether the proponent of the plan can show that "each significant variance between districts was necessary to achieve some legitimate goal." Karcher, supra, 462 U.S. at 731; see, id., at 740 (showing that plan could have had smaller deviations "means only that the burden shifted to the State to prove that the population deviations in its plan were necessary to achieve some legitimate state objective").

Among the "legitimate state objective[s]" identified by the Court in Karcher v. Daggett were "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." Id. at 740. See, e.g., Turner v. State of Arkansas, 1991 WL 316875 (E.D. Ark. Nov. 15, 1991) (upholding congressional reapportionment plan which contained a 0.73% deviation, even though six other plans had smaller deviations, because variance achieved the legitimate state objective of attempting, to the extent possible, to keep counties and voters in the

same district to which they had been assigned under the prior redistricting plan); Stone v. Hechler, Civ. Action No. 91-0110-E, 1992 WL [14671] (N.D. W.Va. Jan. 7, 1992) (upholding congressional redistricting plan with deviation of 0.09% because it served goals of "preserving the cores of previous districts and maintaining district compactness;" court reasoned that "[t]he smaller the population deviation, the greater the importance of the State's interest, and the more consistently the plan as a whole reflects the State's interest, the smaller the State's burden of proof."); Wilson v. Eu, No. S022835, 1992 WL 12071 (Cal. Jan. 27, 1992) ("the need to form reasonably compact districts, to use census tracts rather than blocks in forming districts ... and to comply with the Voting Rights Act," justified a maximum range in the Congressional Plan of 0.25%).

Consistent with this body of cases,[1] Judge Craig properly held that the extremely small deviations in district populations may be justified by, inter alia, a desire to avoid splitting of political subdivisions and precincts, to provide adequate representation to a minority group, and/or to preserve communities of interest.

Judge Craig also properly held that Plaintiffs' Plan No. 2 inherently satisfies the "one person, one vote" requirement. That plan has a total maximum deviation of only 0.0111%. This deviation is smaller than those upheld in Turner, Stone and Wilson, and is fully justified by the policy of preserving the boundaries of municipalities and precincts. Plaintiffs' witness Mark McKillop, who supervised the drawing of the plan, testified that "[W]e did not feel that splitting a lot of municipalities would serve a purpose," and that eliminating all the deviations in Plaintiffs' Plan No. 2 "would [have] mean[t] additional municipal and voting district splits." Tr., Vol. I, p. 58. Thus, Plaintiffs' Plan No. 2 splits only

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[1] *Judge Craig relied on earlier cases, to wit, Shayer v. Kirkpatrick, 541 F.Supp. 922 (1982), aff'd. sub nom., Schatzle v. Kirkpatrick, 456 U.S. 966 (1982); Carstens v. Lamm, 543 F.Supp. 68 (1982); Dunnell v. Austin, 344 F.Supp. 210 (1972).*

nineteen (19) counties, eight (8) localities, and three (3) precincts - a smaller number than either O'Donnell Plan A, Loeper Plan 1, or the mathematically exact Murtha-McDade Plan.[2] *In short, Judge Craig sensibly held that Plaintiffs' Plan No. 2 satisfied the "one person, one vote" requirement, and the Intervenors' arguments to the contrary must be rejected.*

II. Section 2 of the Voting Rights Act

At the beginning of the hearings, Judge Craig stated one factor that he would consider was "whether the plans operate to dilute the voting impact of any minority." Tr., Vol. I, p. 11. After evaluating the various plans with this factor in mind, Judge Craig ruled that Plaintiffs' Plan No. 2 best protected minority voting rights. We agree. Judge Craig must be affirmed based on the evidence adduced at the hearings that: (a) Plaintiffs' Plan No. 2 did not effectively dilute minority strength in the Second Congressional District, and (b) all plans except Plaintiffs' Plan No. 2 did dilute minority voting strength in the First Congressional District.

The primary tool for preventing minority voting dilution is Section 2 of the Voting Rights Act of 1965, 42 U.S.C. §1973. As amended in 1982, Section 2(a) prohibits any state law or practice which "results in a denial or abridgement of the right ... to vote on account of race...." 42 U.S.C. §1973(a). Section 2(b) provides that:

---

[2] *The only plan that split fewer precincts and political subdivisions than Plaintiffs' Plan No. 2 was O'Donnell Plan B, which also had a slightly lower deviation. As shown below, however, this plan failed to give adequate recognition to minority voting strength in Philadelphia, since it created only one district with an African-American majority, whereas Plaintiffs' Plan No. 2 created two such districts.*

> *A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of the class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered. Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.*

42 U.S.C. §1973(b) (emphasis added).

All parties submitted plans that decreased the African-American percentage in the Second Congressional District (which is currently about 81% African-American in total population) and increased it in the First (which is currently 34% African-American). Plaintiffs' Plan No. 2 made both districts over 50% African-American in total population, with the First Congressional District at 52.4% and the Second Congressional District at 62.242%. The evidence showed that both Districts would henceforth give African-Americans the opportunity to elect candidates of their choice. Tr., Vol. I, pp. 71-72. There is no evidence that any other plan provided such an opportunity. The issue that divided the various parties was whether Plaintiffs' Plan No. 2 lowered the African-American percentage too much in the Second Congressional District thereby depriving African-American voters of their opportunity to participate in the political process and elect candidates of their choice.

Plaintiffs' Plan No. 2 creates a so-called "super-majority" African-American district of 62.242% in the Second Congressional District. Recommended Decision, at 25. This district is an "effective" minority district, i.e., one that will provide African-American voters an opportunity to continue to elect a representative of their choice. Tr., Vol. I, pp. 71-72.

Although it has been argued that the Second Congressional District should have a total African-American population closer to 70%, Judge Craig properly found that "The record here contains no evidence that 65% to 62% would risk minority group effectiveness...". Recommended Decision, at 25. Moreover, the cases in this Court and others confirm that Plaintiffs' 62% African-American district will not dilute minority voting rights. This Court recently affirmed a legislative reapportionment plan which contained four State Senate Districts with a 60% African-American total population in each. In re: Pennsylvania Legislative Reapportionment Commission, No. 190 E.D. Misc. Dkt. 1991 (February 14, 1992). A voting analysis in that case indicated that the participation rate of African-Americans exceeded that of whites in Democratic primary elections in Philadelphia and that there is considerable "crossover" voting by whites for Democratic African-American candidates in Philadelphia. Based on these facts, the analysis concluded that a district with a total African-American population of approximately 60%, or a voting age population in the high 50's, would provide African-American voters a viable opportunity to elect candidates of their choice.

Other courts have approved districts with African-American total populations well below 65%. For example, in Jordan v. Winter, 604 F.Supp. 807 (N.D. Miss.) aff'd, 469 U.S. 1002 (1984), the court ordered into effect a redistricting plan for Mississippi that established one congressional district with an African-American total population of 58.3%. The court rejected the plaintiffs' arguments that this percentage was too small to enable African-Americans to elect a representative of their choice and that a district with a voting age population of at lease 60% African-

American was necessary. Id. at 814. This district, in 1986, elected Mississippi's first African-American congressman since Reconstruction.

Similarly, in James v. City of Sarasota, 611 F.Supp. 25, 28 (M.D. Fla. 1985), the court held that a district containing a 50.1% African-American total population and a 42.6% voting age African-American population was sufficient for purposes of Section 2, despite the existence of white bloc voting, because minority voter turnout had historically exceeded that of whites in the district. The Department of Justice, in a letter to the court, noted that:

> *...figures on minority voting-age populations [are] far more useful to the analysis than total minority population percentages. But in neither case do we attach particular significance to a 65 percent population figure, and no attempt is made to add arbitrarily increments of five percentage points each to compensate for age, registration and turn-out differences.*
>
> *Accordingly, the Attorney General has frequently concluded, based on the facts presented in a particular submission, that districts containing a minority population significantly less than 65 percent of the total are racially fair districts and that the plan submitted is entitled to Section 5 preclearance.*

611 F.Supp. at 32 and 33.

In short, there is no legal requirement either in the courts of the Commonwealth or the federal courts, that a district have a 65% African-American total population to satisfy Section 2. The arguments to the contrary must, therefore, be rejected.

In Thornburgh v. Gingles, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986), the United States Supreme Court stated that "Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." 478 U.S. at 46, n. 11. Here, other plans concentrate African-American voters into the Second Congressional District thereby diluting the voting strength of African-American voters in the First Congressional District.

The justification advanced for this dilution has been that the Second Congressional District had to be over 65% in order to protect the incumbent. Such a justification, however, does not mandate making the Second Congressional District almost 70% African-American when the result is to dilute African-American voting strength in the neighboring First District, which is only 46.76% African-American under the Loeper Plan and even less under both O'Donnell Plans and the Murtha-McDade Plan. Although incumbency protection is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. Garza v. County of Los Angeles, 918 F.2d 763, 771 (9th Cir. 1990), cert. denied, 111 S.Ct. 681 (1991). There is no statistical evidence indicating that a 70% African-American district is necessary to provide the African-American community an equal opportunity to elect a representative of their choice. To the contrary, the evidence shows that a 62% African-American district would suffice. The effect of creating a concentrated Second Congressional District is to dilute impermissibly the voting strength of minorities in the adjacent First Congressional District. See, Williams v. City of Dallas, 734 F.Supp. 1317, 1415 (N.D. Tex. 1990). We think that Judge Craig

made a sound, lawful choice under these facts and circumstances, and we adopt it as our own.[3]

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[3] *The Loeper Intervenors also argue that Plaintiffs' Plan No. 2 reduces the African-American population in Congressional District 14 (Pittsburgh) from 23% to 17.81% and that Judge Craig improperly failed to make findings that these reductions would be harmless to minority voters in Allegheny County. This argument must be rejected. Neither the Loeper Intervenors nor anyone else has offered any evidence regarding the degree of influence presently enjoyed by minority voters in Allegheny County, much less any evidence that such influence would be impaired by the small reduction in the African-American percentage in a district that already has a relatively small African-American population.*

III. Additional Criteria

A. Plaintiffs' Plan No. 2 is Politically Fair

Plaintiffs' Plan No. 2 results in a politically fair balance in the Pennsylvania delegation between Democrats and Republicans. Pennsylvania is losing two (2) seats, and Plaintiffs' Plan No. 2 divides the loss evenly. Consequently, the estimated political party balance will be ten (10) Democratic and eleven (11) Republican districts. The other plans submitted to this Court appear to strike a similar political balance.

B. Plaintiffs' Plan No. 2 Splits a Minimum Number of Municipalities and Precincts

Any municipality or precinct splits in Plaintiffs' Plan No. 2 were necessary to comply with applicable state and federal legal requirements concerning the "one person, one vote" standard or minority voting rights. As discussed above, Plaintiffs' Plan No. 2 splits far fewer precincts and municipalities than either the mathematically exact Murtha-McDade or the Loeper Plan, and splits about the same number as the O'Donnell Plans. We are sympathetic to those Intervenors, or parties who filed amicus briefs with this Court, complaining of county, municipality or precinct splits in their areas. We think, however, that some such splitting is inevitable and that Plaintiffs' Plan No. 2 eliminates these defects to the maximum degree possible.

IV. The February 11, 1992 Deadline

We repeat what we stated above. Judge Craig's rigid adherence to the February 11, 1992, deadline was absolutely correct. The parties complaining had ample notice of the deadline and should have been well aware of its importance as they would be of any statute of limitations or other judicial order imposing a time deadline. Not to adhere to the deadline imposed would create

or would have created chaos and we will not countenance such a result.

For the reasons set forth above, we have adopted Judge Craig's "Findings, Recommended Decision and Form of Order" and dismissed all exceptions filed to it.

MR. CHIEF JUSTICE NIX, MR. JUSTICE LARSEN and MR. JUSTICE McDERMOTT did not participate in the consideration or decision of this case.

APPENDIX "A"

ROBERT J. MELLOW, Senator, 22nd District, J. WILLIAM LINCOLN, Senator, 32nd District, LEONARD J. BODACK, Senator, 38th District, MICHAEL J. O'PAKE, Senator, 11th District, PATRICK J. STAPLETON, Senator, 41st District, JEANETTE F. REIBMAN, Senator, 18th District, VINCENT J. FUMO, Senator, 1st District, and H. CRAIG LEWIS, Senator, 6th District, Individually and in their official capacities,	:	IN THE SUPREME COURT OF
	:	No. 7 M.D. Misc. Dkt. 1992
	:	COMMONWEALTH OF PENNSYLVANIA
	:	NO. 0025 M.D. 1992
Petitioners,	:	
v.	:	HEARD: FEBRUARY 13, 14, 15, 1992
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, in their official capacities only,	:	
Respondents.	:	

FINDINGS, RECOMMENDED DECISION AND FORM OF ORDER
By President Judge David W. Craig
Commonwealth Court of Pennsylvania

FILED:
February 24, 1992

This case involves some feats of modern computer technology, by which one plan has been able to reapportion Pennsylvania's 1990 population of 11,881,643 persons with ultimate mathematical precision among 21 proposed congressional districts so that the average deviation from the ideally equal district population of 565,793 is *less than 1 person.*

Where the task of selecting among at least six reapportionment plans has fallen to the judiciary because the General Assembly has not acted, does the constitutional principle requiring district population equality "as nearly as is practicable....," Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964), mandate acceptance of only a mathematically absolute plan?

Or is some departure from mathematical perfection warranted by concerns about whether the proposed congressional districts

- are compact and contiguous,
- facilitate community-of-interest concerns of minority groups and of areas having regional ties, and
- minimize fragmentation of municipalities and voting precincts,

to provide reassurance that gerrymandering is not involved?

PROCEDURAL HISTORY[1]

(1) On December 31, 1990, after the 1990 decennial census count established Pennsylvania's population, at the point of counting, to be 11, 881, 643, the Clerk of the U.S. Congress issued a Certificate of Entitlement to the Pennsylvania Secretary of the Commonwealth entitling the Commonwealth henceforth to have only 21 districts, a loss of 2 seats below the 23 districts established by the General Assembly in 1981. 25 P.S. §3571.

(2) During 1991 and in 1992 until the present, efforts of Pennsylvania's legislators to enact a new 21-district reapportionment statute fell short of the votes needed for passage in both houses.

(3) On January 28, 1992, the first day for circulating nomination petitions for election to the U.S. Congress, 25 P.S. §2868, eight Democratic state senators[2] filed this equity action in the original jurisdiction of the Commonwealth Court against Pennsylvania's state election officials.[3]

The pleadings noted that the last day for filing nomination petitions, February 18, 1992, was fast approaching, and the plaintiffs requested this court

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[1]*Each numbered paragraph is a finding of fact. Unnumbered paragraphs embody description of the content of pleadings, the content of the docket and discussion.*

[2]*Robert J. Mellow, J. William Lincoln, Leonard J. Bodack, Michael J. O'Pake, Patrick J. Stapleton, Jeanette F. Reibman, Vincent J. Fumo and H. Craig Lewis.*

[3]*Acting secretary of the Commonwealth Brenda K. Mitchell, Elections Commissioner William Boehm and the Pennsylvania Department of State.*

- to declare the existing congressional apportionment law, 25 P.S. §3571, to be unconstitutional, as in violation of art. 1, §2 of the U.S. Constitution,

- to enjoin the implementation of the official election schedule as to the congressional election until a valid plan is adopted, and

- to adopt a valid reapportionment plan if the legislature continues to be unable to do so.

Senior Judge Barry of the Commonwealth Court held a prompt hearing on the plaintiffs' application for a preliminary injunction with respect to the relief requested.

(4) The pre-existing congressional districts now depart from the ideal population of 565,793 per district by as much as 19.89% below that figure (present 14th District with 112,514 fewer persons) and as much as 3.76% above the ideal figure (present 16th District with 21,255 persons above the ideal).

Of course, the underpopulation of most existing districts is exacerbated by the fact that there are 23 of them, instead of just 21 districts, on which the ideal population is based.

On January 30, 1992, Judge Barry granted a preliminary injunction on the basis that the present apportionment is unconstitutional, enjoining the implementation of the present schedule for electing members of Congress in Pennsylvania.

The order retained jurisdiction and required all parties and intervenors, if any, to submit their proposed reapportionment plans to this court not later than February 11, 1992.

Finally, Judge Barry's order advised that the court would select a plan for adoption and implementation if the General Assembly had not enacted a valid 21-district plan by February 11, 1992.

(5) As of February 12, 1992, the legislature had not enacted any reapportionment plan for Pennsylvania.

Hence, by order of that date, the Commonwealth Court directed final hearings to begin on the following day, Thursday, February 13, 1992, to receive evidence and to consider all proposed plans which had been timely filed on or before February 11.

In the meantime, the plaintiffs presented 3 plans, called Plaintiffs 1, 2 and 3. The Attorney General intervened, and additional parties were granted intervention as follows.

(6) Eight Democratic members of the Pennsylvania House of Representatives[4] intervened and timely filed 2 plans, called O'Donnell A and O'Donnell B.

(7) Representative Harold James of the Pennsylvania House of Representatives also timely filed a plan, the Hughes Plan, which, although in the form of a statewide bill, seeks political effectuation of African-American interests in congressional districts in Philadelphia.

(8) Two members of Pennsylvania's congressional delegation, Congressmen Joseph M. McDade and John P. Murtha,

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[4] *Robert W. O'Donnell, H. William DeWeese, Allen G. Kukovich, Dwight Evans, Frank Oliver, Thomas Michlovic, Gordon Linton and Harold James.*

intervened and timely presented a plan, the Murtha-McDade Plan, prepared on behalf of 11 members of the present Pennsylvania congressional delegation.

(9) Six Republican state senators[5] intervened and timely filed a plan, called Loeper 1.

(10) Four groups of intervenors, persons concerned with maintaining congressional district configurations, also intervened with reference to Bucks County, Cumberland County, Berks and Schuylkill Counties, and the Lehigh Valley, involving Lehigh and Northampton Counties. These parties proposed to support certain statewide plans and to oppose other plans.

(11) On February 12, 1992, after the expiration of the February 11 deadline set by Judge Barry's order, two Republican members of the Pennsylvania House of Representatives, Matthew J. Ryan and Roy W. Cornell, intervened, but the plan they filed had to be deemed not timely in accordance with this court's order.

(12) Finally, after February 11, 1992, intervention also was obtained by Albert Swann, together with the Frederick Douglas Society and Philadelphia Leadership Conference, with a petition expressly supporting a proposal to establish an additional congressional district in which the African-American population would be a majority group, over and above the one district (the Second) now having a majority Black population.

(13) Congressman Lucien Blackwell, who sought intervention after the record was closed, was allowed intervention limited to the filing of a brief.

The plaintiffs had applied to the Pennsylvania Supreme Court to take plenary jurisdiction and had also filed a companion

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[5] *F. Joseph Loeper, Robert C. Jubelirer, D. Michael Fisher, Charles Lemmond, Hank Salvatore, Noah Wenger.*

action in the United States District for the Middle District of Pennsylvania.

During the course of the three days of hearings in the Commonwealth Court, the Pennsylvania Supreme Court, by order of February 13, adopted a sound course for expediting the matter — and obviating the delay which could be incurred by the course of an appeal-of-right taken from the Commonwealth Court to the Supreme Court — by taking plenary jurisdiction, designating President Judge David W. Craig of the Commonwealth Court as Master to conduct the hearings and report to the Supreme Court not later than Wednesday, February 26, 1992 with findings, a recommended decision and a form of order.

Judge Sylvia Rambo of the United States District Court for the Middle District of Pennsylvania advised that the district court would await state court action providing that the Commonwealth Court had acted by Monday, February 24, 1992 (the date on which these findings, recommended decision and form of order are being filed).

The hearings by the Commonwealth Court, begun on Thursday, February 13, were concluded on Saturday, February 15, at which time the election administrators agreed to file a proposed election schedule revision with the Commonwealth Court by February 19, with briefs to be filed by regional parties on Thursday, February 20, and by statewide parties on Friday, February 21.

(14) During the course of the three days of hearings, the plaintiffs withdrew Plaintiffs' Plan 3.

(15) The Republican state senators sought to present an amended version of Loeper Plan 1, which amendment is referred to as Loeper Plan 2 in the record. Having deferred ruling on its admission for consideration as a statewide plan, the President Judge ruled at the close of the evidence that such amended plan, Loeper

2, was not entitled to consideration as a separate plan because it had not been timely filed by February 11, but held that testimony concerning it was admissible as evidence relevant to the evaluation of all other plans.

The President Judge did not reverse any ruling, but only deferred ruling to provide maximum consideration, even as to untimely filings.

Exclusion of Untimely Plan Filings

Enforcement of the February 11 filing deadline with respect to statewide proposals has been necessary to assure that the courts would have a reasonable opportunity to consider the plans which were timely filed.

All parties have had many months to prepare a proper plan.

If the court had opened this time-constrained case to late plans and amendments filed after the February 11 deadline plainly stated in Judge Barry's order, the proceedings would have been endless because (1) new intervenors would have required many new plans to be reviewed, and (2) the earlier parties could have amended their timely plans repeatedly, to surpass the new plans.

Hence, the late amendment of the Loeper Plan was excluded, although Loeper counsel was allotted full participation and the amended data was received in Court Exh. AA.

Similarly, the Ryan-Cornell Plan proponents were accorded status as parties with full participation in cross-examination. Ryan Plan data was received in Court Exh. AA.

Exclusion of full consideration of the Ryan Plan was justified because that plan was in existence on and before February 11. There was no reason that the plan could not have been timely presented. It was knowingly withheld from being filed in the court

on that date, on the ground that further legislative action then was possible.

The President Judge did not exclude plans on the basis of political party. The President Judge excluded all untimely proposals and considered all timely ones of all parties.

THE CONTROLLING CONSTITUTIONAL PRINCIPLES

Below, as Finding No. 16, a factual comparison of the plans will be presented. Before considering that finding and other facts constituting the minor premises of the logic involved, reference to the constitutional principles, as enunciated by the United States Supreme Court, is necessary.

Equality of Congressional District Populations One Person, One Vote

Congressional redistricting becomes a judicial responsibility only when, as here, the state legislature has not acted after having had an adequate opportunity to do so. White v. Weiser, 412 U.S. 783, 794-95 (1973), Reynolds v. Sims, 377 U.S. 583, 586 (1964).

In applying art. I, §2 of the U. S. Constitution, the United States Supreme Court has held, as noted above, that the goal is to make "as nearly as is practicable one man's vote in a congressional election ... worth as much as another's." Wesberry.

This requirement is the "preeminent if not the sole, criterion" for appraising the validity of redistricting plans. Chapman v. Meier, 420 U.S. 1, 23 (1964).

The United States Supreme Court has declined to adopt any particular deviation figure as the maximum deviation per se allowable. Kirkpatrick & Preisler, 394 U.S. 526, 530-31 (1969). Population variances among districts must be justified. Id.

That reluctance has fostered a wise constraint, as we can see by noting our advancing ability, in the last two decades, to perform mathematical manipulations by computer tools which can review in a short time great multitudes of variables which could not be examined by the machine-aided methods of the past within any feasible time period.

However, a plan is not per se unconstitutional just because a smaller population deviation could be achieved. Karcher v. Daggett, 462 U.S. 725 (1983).

Consider the various maximum total deviations — at times on this record called the "maximum range of deviations" — which have been accepted or rejected during recent years. The Supreme Court has defined maximum total deviation as

> the sum of the percentage by which ... [the] most populous district ... exceeds the ideal district population ... and the percentage by which ... the least populous ... [is] below this ideal.

Board of Estimate v. Morris, 489 U.S. 688, 700 n.7 (1989).

In 1969, Kirkpatrick held that a 5.97% maximum deviation was bad. In 1973, White v. Weiser rejected a .284% maximum deviation (less than 3/10ths of 1 percent) in favor of a .149% maximum deviation.

In 1982, the most recent Pennsylvania Congressional District Reapportionment Case, 567 F. Supp. 1507 (M.D. Pa. 1982), aff'd without opinion, sub nom., Simon v. Davis, 463 U.S. 1219, (1983), an opinion by Circuit Judge Weis, for a three-judge court, accepted a maximum deviation of .2354%, and, after further census revision, a maximum deviation of .399%, noting that the difference between those two figures — one-fourth of one percent

v. four-tenths of one percent — could be statistically insignificant, particularly when our constantly moving population necessarily means that a census count is simply the "snapshot" of a particular moment in time. 567 F. Supp. at 1515.

This present case has produced, in the Murtha-McDade Plan, the ultimate of equality with a maximum deviation of .0000017%, consisting of a difference of just one person out of 565,793. Departures from such mathematical perfection, according to the federal courts, are justified but only to advance the cause of equality realistically in the following respects:

- avoiding fragmentation of local government territories and splitting of election precincts, Shayer v. Kirkpatrick, 541 F. Supp. 922, 933 (1982), aff'd sub nom., Schatzle v. Kirkpatrick, 456 U.S. 966, (1982);

- effectuating adequate represen-tation of a minority community, Shayer, 541 F. Supp. at 930-31;

- creating districts which are compact and contiguous, Carstens v. Lamm, 543 F. Supp. 68, 82-88 (1982);

- maintaining relationships of shared community interests, Carstens, 543 F. Supp. at 82, 90-91; and

- not unduly departing from the useful familiarity of existing districts, Dunnell v. Austin, 344 F. Supp. 210 (1972).

All timely plans must be considered on the same footing, despite the Murtha-McDade Plan's claim to be the only "bipartisan"

one. It is, but, like all the plans, it is not disinterested, having been submitted on behalf of 11 incumbents.

FACTUAL ANALYSIS

Direct and close comparison of the six competing plans is facilitated by Finding No. 16, which follows.

First, an explanation of the columns in Finding No. 16 is desirable.

Column 1 — Identification of Plan: In addition to the record name for each plan, this column identifies the specific legislative bills, if any, which have substantially embodied the plan in the General Assembly. None of the listed bills was passed by both houses.

Column 2 — Maximum Deviation: As defined above, this percentage figure is the sum of the percentage by which the most populous district exceeds the ideal equality number, plus the percentage by which the least populous district falls below that ideal number.

Column 3 — Average Deviation: The mean figure which reflects an average of the percentage deviations for all 21 districts in the respective plan.

Column 4 — Split Municipalities: Remembering that the term "municipality" includes counties, as well as cities, boroughs and townships in Pennsylvania, 1 Pa. C.S. §1991, this column gives a count of the municipalities to which more than one of the proposed districts of the plan applies. This column treats Philadelphia as a county rather than a city.

Column 5 — Split Election Precincts: Although a voting unit in Pennsylvania is officially termed an "election district,"

25 P.S. §2602(g), the table and the record here use, for the same concept, the term "precinct" in order to avoid confusion with the congressional "districts" which are the principal subject matter of this proceeding.

Columns 6, 7 — African-American Population of District 1: These columns relate to the potentiality of a second congressional district with an African-American majority population, which would be in addition to Congressional District 2, which all plans recognize as presently being a majority African-American district in Philadelphia. Column 6 gives the African-American population percentage of the respective proposed district, and Column 7 gives the percentage of voting age African-American population in the proposed district.

Column 8 — Regional Communities of Interest: This column indicates those plans which recognize the community-of-interest relationships established by the evidence (discussed below) as to (1) Lehigh Valley's long-standing joinder of Lehigh and Northampton Counties in one congressional district, (2) Berks and Schuylkill Counties' long-standing joinder in one congressional district, (3) keeping Bucks County in one congressional district, and (4) retention of Carlisle and adjacent municipalities such as North Middleton Township, in Cumberland County, within the 19th Congressional District.

Column 9 — Estimates of Party Balance of Seats: Based solely on party registration statistics, this column gives the number of congressional seats thus projected for each party with respect to each plan across the state.

Because the criterion of compactness and contiguity involves visual inspection of a graphic presentation of the shape of a congressional district, that factor cannot be reflected by means of the tabulation in Finding No. 16, but must be considered separately.

The information tabulated in Finding No. 16 is drawn from Court Exhibit AA, comprised of listings of plan elements supplied by each party proposing a statewide plan, to confirm the stipulations of data which counsel entered into the record. Record Vol.1: pp.14-16, 20, 31, 61, 62, 76.

FINDING NO. 16

1	2	3	4
PLAN BILL NO. PRNTR. #	**MAXIMUM DEVIATION %**	**AVERAGE DEVIATION %**	**SPLIT MUNICIPAL UNITS**
PLNTFS.1 HB 541 #3024	.1616%	.0393%	16 Counties 1 Local
PLNTFS.2 HB 541 #3024	.0111%	.0024%	19 Counties 8 Local
O'DONN.A HB 2185 SB 205	.0113%	.0026%	23 Counties 8 Local
O'DONN.B	.0083%	.0027%	17 Counties 8 Local
LOEPER 1 HG 541 #3053	.1334%	.0324%	22 Counties 10 Local
Murtha-McDade	.0000% (1 person)	.0000% (less than one person)	21 Counties 27 Local

FINDING NO. 16

5	6	7	8	9
SPLIT ELECTION PRECINCTS	AFR-AMER POP. C.D. 1	AFR-AMER V.A.P. C.D. 1	REGIONAL INTERESTS (COUNTIES)	PARTY REGIS. BALANCE
1	52.4%	49.7%	LEHIGH BERKS CUMB.	10 D 11 R
3	52.4%	49.7%	LEHIGH BERKS CUMB.	10 D 11 R
0	39.2%	36.1%	CUMB.	10 D 11 R
0	36.6%	33.6%		11 D 10 R
1	46.7%	43.4%	LEHIGH	11 D 10 R
22	41.7%	38.0%	CUMB.	10 D 11 R

In cases like the present, the judicial task has usually consisted of choosing one redistricting plan out of two or more, as the plan conforming most closely to constitutional standards, e.g., White v. Weiser, O'Sullivan v. Brier, 540 F. Supp. 1200 (1982).

Unequipped to formulate a plan from scratch, the courts are also hard put to develop an ideal plan from a combination of several plans because that would be a feat similar to assembling a single completed jigsaw puzzle from the disparate pieces of several of them.

Moreover, if the courts adhere to a tradition of choosing one or the other of the plans proposed by the antagonists — like an arbitrator who confines approval to either the high demand of one side or the low offer of the other — then the challenge to develop mutually acceptable plans will be left in the legislature, where the job of political compromise belongs, rather than with the courts.

Therefore, the general question in this case is: Which of the half-dozen plans timely offered to this court comes closest to the constitutional standards in all pertinent respects?

Districts Equal In Population
To The Greatest Practicable Extent

The Murtha-McDade Plan (M-McD Exhs. 1-3) has achieved remarkable mathematical exactitude, with a maximum deviation of .0000017% and an average deviation of .0000009%.

However, the Murtha-McDade Plan falls below others precisely because the cost of achieving maximum mathematical equality lies in having the congressional district boundaries split 22 election precincts as well as 27 local governments.

Although 22 precincts constitute a small fraction of the 9,434 precincts in the state (R1:164), a serious election

administration problem arises from requiring the voters in a single precinct to look to two different sets of congressional candidates. Shayer.

The problem is not a minor one. It arises from the fact that exactitude requires manipulation of the smallest census unit, the census block; Pennsylvania has 300,000 of them (R1:164) and their boundaries, based on visual limits useful to census taker functions, are not coterminous with the governmentally determining boundaries of the 9,434 election precincts.

Of course, redrawing official precinct boundaries to match the ideal congressional district is theoretically possible, but is not practical because each election precinct must serve many other different exercises of the franchise — for the election of legislators and council members, for example.

Nearest to the Murtha-McDade Plan in exactitude is the O'Donnell Plan B (O-B Exhs. 4-6), with a .0083% maximum deviation (R1:16), a .0027% average deviation (R1:20) and no split precincts.

Also close in equality of districts is Plaintiffs' Plan 2, with .0111% maximum deviation (R1:14), a .0024% average deviation, and with three split precincts, one of which affects no population.

The Loeper Plan, splitting just one precinct, has only a slightly higher deviation, at .1334% maximum and .0324% average.

The Murtha-McDade Plan proponents have questioned the validity of data adjustments made by the Legislative Data Processing Center and therefore affecting all of the other plans at issue, as drawn by legislative caucuses.

The Executive Director of the Legislative Data Processing Center described how the Center dealt with the problem which arises when a census block is split between two precincts or among

more than two precincts (R1:162). This problem involves 2.6% (7,915) of the 300,000 census blocks in Pennsylvania; none of the census blocks are split across any municipal boundary.

Rather than arbitrarily assign a split census block entirely to one precinct or another, the Legislative Data Processing Center, since 1980, has divided the census block population between the two precincts in proportion to the ratio of voting registrations in the two precincts.

The Murtha-McDade proponents' question is based on the contention that such an adjustment can be an invalidating factor because it departs from the official U. S. census figures. However, no authority for that proposition has been presented, and it is obvious that an arbitrary assignment of all of the population of a split census block to just one of the precincts would provide a result necessarily less accurate, and therefore less valid than the adjustment described.

Further evaluation of these plans, all of which are acceptable in terms of population equality, must ultimately depend upon other criteria. Karcher.

Racial Minority Empowerment or Dilution

Because the African-American population constitutes 9% of Pennsylvania's people, the formation of two Black majority districts is possible. When possible, an increase in the number of minority-in-the-majority districts is constitutionally required. Thornburgh v. Gingles, 478 U.S. 30 (1986); Jeffers v. Clinton, 730 F. Supp. 196 (1989); Hastert v. State Board of Elections, 777 F. Supp. 634, 651 (1991).

Philadelphia, one of the three Pennsylvania counties large enough to embrace more than one congressional district, has a 39.85% African-American population (R1:38). Therefore, the

various planners have looked to Philadelphia and to the City of Chester, the city in adjacent Delaware County which is the only Pennsylvania city with an African-American majority of citizens.

To date, the only African-American majority congressional district has been the Second District, currently at about 81% African-American population (R2A:54).

The key question is whether another Black majority congressional district can be mapped out of the adjoining First District, by including in it Chester City and, necessarily, some small part of the present super-majority Second District.

Not surprisingly, the serious positions of the parties with special African-American concerns differ on this issue.

Supporters of the Hughes Plan for Philadelphia, represented by intervenor Harold James, would avoid reducing the Second District below 68% African-American population by raising the First District African-American population only to 47.18%, not a majority. Although that First District would also then have an ethnic Hispanic population of 10.71%, which is an acceptable consideration, Campos v. City of Baytown, Texas, 840 F.2d 1240 (5th Cir. 1985), the result does not fully address the racial group goal by counting in a group which is an ethnic one in census terms. Moreover, aggregating two minority groups is allowable only if they are shown to be politically cohesive, League of United Latin American Citizens v. Midland, 648 F. Supp. 596 (1986), and there is no such proof on this record as to Hispanic and Black minorities.

There has been a contention that, to be a safe super-majority district, the Second District should not go below 69% or 68% African-American population. Congressman Blackwell, the incumbent of the Second District, permitted to intervene late in this case to submit a brief, contends that reduction below the present 81% African-American population would be a "dilution" of the minority representation effectiveness, but that term has normally

been applied when the result is to fence minority groups into minority voting positions. Carstens.

Minority voting should be maximized as much as possible. Jeffers v. Clinton.

The Loeper Plan keeps the Second District at 68.055% African-American population but at the cost of achieving only 46.7% African-American population in the First District. The excluded Loeper Plan amendment, with 65.857% African-American population in the Second District still would have had the First District just below a majority of African-American population, with 49.048%.

The Ryan Plan data in Court Exh. AA shows that, even if it had been timely filed so as to receive full consideration, it would not be acceptable because it did not create another Black majority district, in that its proposed First District would have been 47.5% African-American population.

Intervenors Philadelphia Leadership Conference, Frederick Douglas Society and Albert Swann urge the court to uphold the creation of a second African-American minority-in-majority district, namely the First District, while maintaining a substantial majority population of the minority group in the Second District.

The Plaintiffs' plans, both 1 and 2, would achieve that goal by getting the First District past the 50% barrier to 52.4% African-American population (R1:62), which would still leave the Second District at a healthy 62.242% African-American majority (R1:61), still entitled to be labeled as a strong majority, if not a "super" one.

The record here contains no evidence that 65% or 62% would risk minority group effectiveness (R3:21, 22). Indeed, a 60% minority group threshold has been held to be acceptable in this respect. Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988).

The O'Donnell Plan A, on the other hand, proposes only 39.2% in the First District and the O'Donnell Plan B only 36.6% in the First District. The Murtha-McDade Plan also does not achieve a Black majority in the First District, with a 41.7% African-American population figure.

The hearings in this case have investigated this matter from all aspects, even pointing out that many African-American voters which would be added to the First District from Chester City may be registered Republican, not Democratic. Of course, that is not a startling revelation. No court can accept any false stereotypical belief that Black voters have a monolithic position. Indeed, the variety of views in this case disprove any such idea.

On the basis of deviations from equality minimized as much as possible, with a lessened administrative problem as a result of minimal precinct splitting, and embodiment of a potential for two African-American majority districts, our scrutiny now must focus on Plaintiff Plan 2 as the leading prospect for approval. Examination of that plan in relation to the salient regional concerns, as voiced in this record, must come next.

Regional Concerns

Various intervenors have raised community-of-interest issues with respect to five regions of the state. Evidence of a community of interest among neighboring areas in those regions has been clear and undisputed.

Cheltenham Township, Montgomery County

By brief amicus curiae, Cheltenham Township in Montgomery County has reflected a desire to keep the entire township in the Thirteenth Congressional District.

(17) That is proposed by Plaintiffs' Plans 1 and 2, by the Loeper Plan and by the O'Donnell Plans A and B. However, the Murtha-McDade Plan describes only 73 persons out of Cheltenham's population of 34,923 as being in the Thirteenth Congressional District, thus placing the bulk of Cheltenham elsewhere.

Lehigh Valley, Lehigh and Northampton Counties

(18) Undisputed testimony by Intervenors Freeman, Ritter and McHale establish that Lehigh and Northampton Counties, with aggregate population close to the ideal district population, have been together within the Fifteenth Congressional District since 1972.

(19) The valley itself, its circulation arteries, its common news media, and its organizational and cultural ties have a unifying influence on this Lehigh Valley Area. (R3:154-190).

(20) None of the statewide plans precisely include all of the area preferred by the Lehigh Valley advocates, who would also include a portion of Berks County. The two counties of Lehigh and Northampton are joined by Plaintiffs' Plans 1 and 2, and by the Loeper Plan. The O'Donnell Plans A and B and the Murtha-McDade Plan do not embrace all of the two counties in a proposed congressional district.

Berks and Schuylkill Counties

(21) The evidence presented by Intervenor Brightbill establishes that the Berks and Schuylkill Counties share a community of interest in a common economic base, in circulation arteries, and in schools of higher education as well as other matters. (R3:190-198)

(22) The relationship of these two entire counties is maintained in Plaintiffs' Plans 1 and 2 but not in the O'Donnell A or B Plans, the Loeper Plan or in the Murtha-McDade Plan.

Cumberland County

(23) Evidence on behalf of Intervenor Jarvis supports the affinity of Carlisle and North Middleton Township, in Cumberland County, with other communities in the Nineteenth Congressional District, rather than in the Ninth.

(24) Plaintiffs' Plans 1 and 2, O'Donnell Plan A and the Murtha-McDade Plan maintain that relationship. The O'Donnell Plan B and the Loeper Plan do not do so.

Summary

(25) The Plaintiffs' Plans 1 and 2 are the only plans which substantially satisfy all of the regional concerns.

Allegheny County

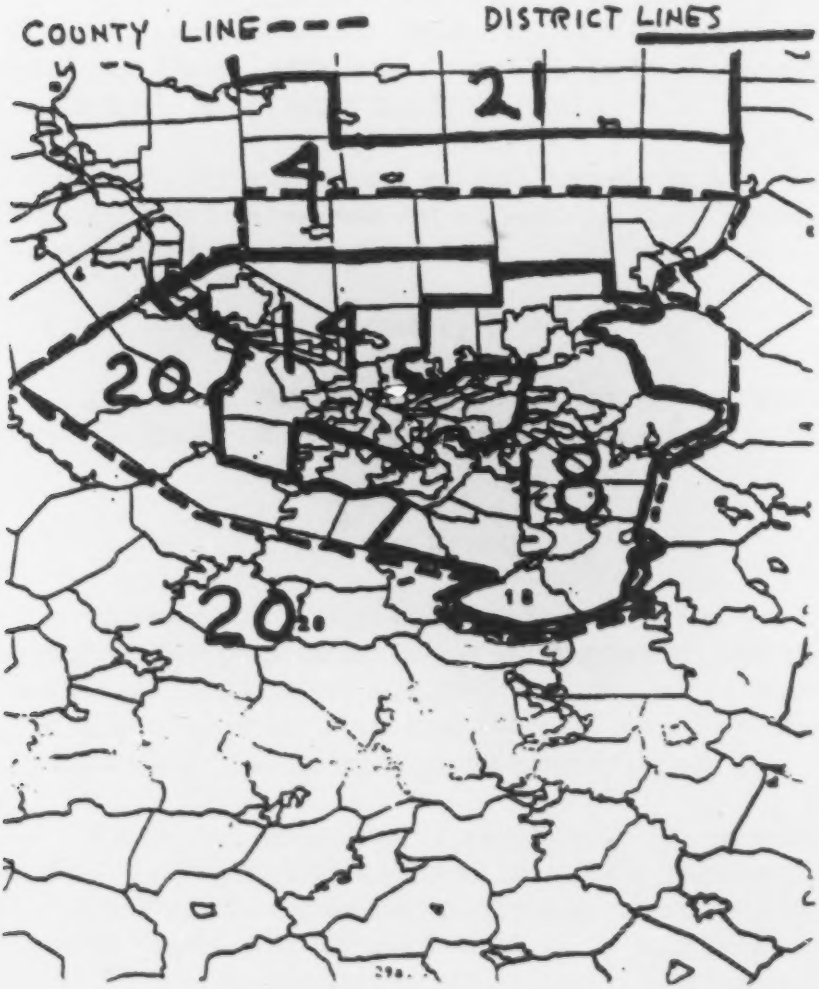
However, the Plaintiffs' Plans 1 and 2 encounter a challenge in their proposed disposition of Congressional Districts Fourteen and Eighteen in Allegheny County and in areas surrounding it, a portion of the state where the most substantial population decline has occurred over the previous decade.

Because of the anticipated retirement of Congressman Gaydos in the Twentieth Congressional District, the repositioning of a portion of that district has loomed large in reducing the number of Pennsylvania districts from 23 to 21. Accusations of partisanship have been directed by various parties at each other.

The issue requires graphic illustration. On the following two pages are shown proposals for Pittsburgh and Allegheny

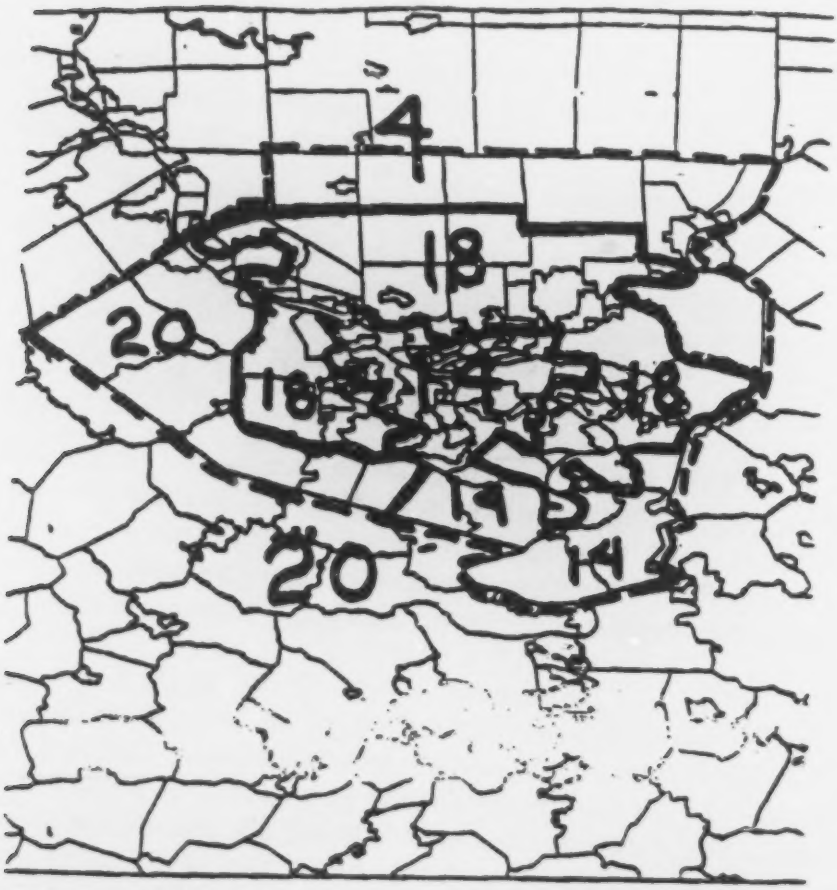
County. The first map following is that proposed by Plaintiffs' Plan 2. The second map following is the same area as it appears in Plaintiffs' Plan 3, the plan which the plaintiffs withdrew during the hearings.

PLAINTIFFS' PLAN 2



BEST AVAILA

PLAINTIFFS' PLAN 3



LE COPY

(26) The City of Pittsburgh has been, and is proposed by all to remain entirely within the Fourteenth Congressional District.

(27) The City of Pittsburgh is surrounded by suburbs on all sides, with suburbs in the North Hills, in Sewickley Valley (in the northwest), and in Chartiers Valley, all having some community of interest. (R2B:108-110)

(28) The city has more in common with the close-in easterly suburbs and in the Monongahela Valley's former steelmaking areas than with the suburbs in the north, west and south.

Plaintiffs' Plan 3 (the second map) appears to recognize those community-of-interest factors by extending the Fourteenth District into the westerly side of the Monongahela Valley and encircling the Fourteenth District with the Eighteenth to embrace the northerly, westerly and southerly suburbs.

The result, however, is to create an Eighteenth Congressional District which in shape is almost a hollow circle with an open arch at the bottom. The present Eighteenth Congressional District also embraces the city on the north, west and south, but not quite in a configuration approximating a circle.

The configuration in Plaintiffs' Plan 2, on the first map, is visually more compact, with the Fourteenth District covering the city and part of the suburbs north and northwest of the city, while the Eighteenth District is proposed to embrace the northeasterly suburbs, the easternmost suburbs and municipalities on both sides of the Monongahela River, plus an arm extending westward to some of the suburbs due south of the city.

Neither of these proposals are models of compactness or contiguity, but in that respect, the Plaintiffs' Plans are not alone. The Loeper Plan proposes a result similar to Plaintiffs' Plan 3, and

the Murtha-McDade Plan would treat the Fourteenth District in some respects similar to Plaintiffs' Plan 3 by extending that district into the northerly suburbs.

Again, when the courts are thrust into this role, with no feasible option except to take one entire plan or the other, applying the more objective criteria of compactness and contiguity indicates acceptance of Plaintiffs' Plan 2 on that basis, as a less satisfying aspect of a plan otherwise meritorious.

CONCLUSION

The resulting recommendation, considering all of the elements reviewed above, is to advise in favor of approval of Plaintiffs' Plan 2 as (1) having a low maximum deviation, (2) consistent with minimal splitting of precincts, (3) achieving an enlarged number of two congressional districts with a majority African-American population and (4) coming closest to implementing the community-of-interest factors in those regions across the state which have identified them.

REVISED ELECTION CALENDAR RECOMMENDATIONS

Reference is made to Memorandum of Respondents, filed on behalf of the Secretary of the Commonwealth and the Election Commissioner, to recommend suggested revisions in the election calendar resulting from this litigation (and also from the separate case involving appeals to the Supreme Court from the Reapportionment Commission).

Noted and recommended for adoption by the Supreme Court is the Secretary's recommendation that the calendar for electing delegates and alternate delegates to the national conventions be revised along with the congressional election calendar because of their related nature.

All of the proposals of the Secretary are hereby recommended for consideration by the Supreme Court, with the exception of the proposed dates for the Commonwealth Court's latest hearing and deadline for filing that court's decisions on objections to nominating petitions.

The Election Code limitation for judicial review of such objections, 25 P.S. §2937, has been held to be directory, not mandatory. In Re Moore, 447 Pa. 526, 291 A.2d 531 (1972).

The development of objections to nominating petitions, usually involving scrutiny of numerous signatures, is time-consuming. Nevertheless, Commonwealth Court, following a Friday, March 13, deadline for filing nominating petitions, would propose to convene hearings on objections promptly on Monday, March 16, before the proposed March 19 deadline for filing such objections.

With Thursday, March 19, as the last day for filing objections, as the Secretary recommends, Commonwealth Court should also have the week of March 23-27 to conclude all hearings.

And the latest day for the filing of the court's decisions, pursuant to those hearings, could be the following Monday, March 30.

Hence, the period from April 1 through April 28 would remain for the important administrative aspects of the election process to proceed.

Of course, if nominating petition objection cases could possibly be concluded sooner than the recommended dates, the Commonwealth Court, being experienced in such litigation, would certainly strive to do so.

Accordingly, a recommended revised election calendar for Congress and delegates to national conventions is appended hereto as Appendix B.

The Secretary has also recommended a revised schedule for elections for Senator and Representative in the General Assembly, appended hereto as Appendix C.

Although that election schedule is not involved in this case, coordination of the congressional election schedule with it would be desirable.

For Commonwealth Court review of objections to nominating petitions for state legislative offices, there is recommended the same period, with hearings to be concluded not later than March 27 and decisions to be filed not later than Monday, March 30. The last such decision probably could be filed substantially sooner because of the earlier March 6 deadline which the Supreme Court has set for filing nominating petitions for legislative office.

FORM OF ORDER

A proposed form of order follows.

Respectfully submitted,

/s/ David W. Craig
DAVID W. CRAIG, President Judge

RECOMMENDED FORM OF ORDER

NOW, , 1992, pursuant to hearing held upon complaint, it is hereby ORDERED as follows:

1. Section 1801-A of the Election Code, Act of June 3, 1937, P.L. 1333, added March 3, 1982, P.L. 127, §2, 25 P.S. §3571, is hereby declared unconstitutional and its implementation for the purpose of conducting elections to the office of Representative in the United States Congress is hereby permanently enjoined.

2. Such elections, in the primary and general elections in the years 1992, 1994, 1996, 1998 and 2000 shall be conducted in accordance with the Congressional Election Districts described in Appendix A, attached to and hereby made part of this Order, and hereby adopted as the apportionment of the Commonwealth into twenty-one (21) Congressional Districts until the same shall be lawfully changed.

3. The schedule for the primary elections to be held April 28, 1992, for the election of Representatives to the United States Congress and for Delegates and Alternate Delegates to National Conventions, shall be conducted by the Secretary of the Commonwealth and by all election officers within the Commonwealth in accordance with the Revised Election Calendar attached to this Order as Appendix B, and hereby made part hereof, to provide for an orderly election process.

4. In addition, the Secretary of the Commonwealth shall, as soon as possible, publish in the Pennsylvania Bulletin and through news media, by description and, if feasible, by maps, the Congressional Districts hereby adopted in Appendix A.

5. The members of Congress now in office shall continue in the office until expiration of their respective terms.

6. Vacancies now existing or happening after the entry of this Order and before the commencement of the terms of the members elected at the election of 1992 shall be filled for the unexpired terms from the districts formerly prescribed in Section 1801-A of the Election Code, Act of June 3, 1937, P.L. 1333, added March 3, 1982, P.L. 127, §2, 25 P.S. §3571.

7. In the event any municipality or part thereof should be omitted in the description of congressional districts in Appendix A, the municipality or part thereof shall be included as a part of the congressional district which completely surrounds it. Should any omitted municipality or part thereof be completely surrounded by one congressional district, it shall become a part of that congressional district to which it is contiguous, or if there are two or more such contiguous districts, it shall become a part of that congressional district contiguous thereto which has the least population.

CRT 2
PLAINTIFFS' PROPOSED
CONGRESSIONAL PLAN

APPENDIX A

LEGISLATIVE DATA PROCESSING CENTER
COMPOSITE LISTING
OF
CONGRESSIONAL DISTRICTS

DISTRICT NUMBER	DESCRIPTION
Dist. 01	DELAWARE and PHILADELPHIA Counties: Part of DELAWARE County consisting of the CITY of Chester (Excluding Blocks 201, 207, 208 of 1990 Census Tract 4046) and the TOWNSHIPS of Darby, Ridley (Blocks 903 and 919 of 1990 Census Tract 4041.03) and Tinicum and the BOROUGHS of Colwyn, Eddystone, Folcroft and Glenolden and Part of PHILADELPHIA County consisting of the CITY of Philadelphia (PART, Wards 01, 02 [PART, Divisions 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 26], 05 [PART, Divisions 02, 03, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 17, 20, 22 and 23], 07, 10, 11, 12, 13, 14, 16, 17, 19, 20, 26, 30, 32, 36 [PART, Divisions 29, 35 and 37], 37, 39, 40, 43, 47, 48 [PART, Divisions 01, 08, 12, 13, 14, 15 and 17] and 49). Total population: 565,802
Dist. 02	DELAWARE and PHILADELPHIA Counties. Part of DELAWARE County consisting of the BOROUGHS of Darby, Lansdowne and Yeadon and Par. of PHILADELPHIA County consisting of

the CITY of Philadelphia (PART, Wards 03, 04, 06, 08, 09, 15, 21, 22, 24, 27, 28, 29, 34, 36 [PART, Divisions 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 36, 38, 39, 40 and 41], 38, 44, 46, 48 [PART, Divisions 02, 03, 04, 05, 06, 07, 09, 10, 11, 16, 18, 19, 20, 21, 22 and 23], 50, 51, 52, 59 and 60).
Total population: 565,815

Dist. 03 PHILADELPHIA County.
Part of PHILADELPHIA County consisting of the CITY of Philadelphia (PART, Wards 02 [PART, Divisions 24, 25 and 27], 05 [PART, Divisions 01, 04, 05, 16, 18, 19 and 21], 18, 23, 25, 31, 33, 35, 41, 42, 45, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65 and 66).
Total population: 565,775

Dist. 04 ALLEGHENY, BEAVER, BUTLER, LAWRENCE and WESTMORELAND Counties. Part of ALLEGHENY County consisting of the TOWNSHIPS of East Deer, Fawn, Frazer, Harrison, Marshall, Pine, Richland and West Deer and the BOROUGHS of Brackenridge, Bradford Woods, Cheswick, Plum and Tarentum; All of BEAVER County; Part of BUTLER County consisting of the TOWNSHIPS of Adams, Buffalo, Clinton, Cranberry, Jackson and Middlesex and the BOROUGHS of Harmony, Mars, Saxonburg, Seven Fields, Valencia and Zelienople; All of LAWRENCE County and Part of WESTMORELAND County consisting of the CITIES of Arnold, Jeannette, Lower Burrell and New Kensington and the TOWNSHIPS of Allegheny, North Huntingdon, Penn, Salem, Upper Burrell and Washington and the BOROUGHS of

Delmont, East Vandergrift, Export, Hyde Park, Irwin, Manor, Murrysville, North Irwin, Penn, Trafford (Westmoreland County Portion) and Vandergrift.
Total population: 565,792

Dist. 05 ARMSTRONG, CAMERON, CENTRE, CLARION, CLEARFIELD, CLINTON, CRAWFORD, ELK, FOREST, JEFFERSON, LYCOMING, MCKEAN, POTTER, TIOGA, UNION, VENANGO and WARREN Counties.
Part of ARMSTRONG County consisting of the TOWNSHIP of Madison; All of CAMERON County; Part of CENTRE County consisting of the TOWNSHIPS of Benner, Boggs, College, Curtin, Ferguson, Gregg, Haines, Harris, Howard, Huston, Liberty, Marion, Miles, Patton, Penn, Potter, Spring and Walker and the BOROUGHS of Bellefonte, Centre Hall, Howard, Milesburg, Millheim and State College; Part of CLARION County consisting of the TOWNSHIPS of Ashland, Beaver, Brady, Clarion, Elk, Farmington, Highland, Knox, Licking, Limestone, Madison, Millcreek, Monroe, Paint, Perry, Piney, Porter, Red Bank, Richland, Salem, Toby and Washington and the BOROUGHS of Callensburg, Clarion, East Brady, Foxburg, Hawthorn, Knox, Rimersburg, Shippenville, Sligo, St. Petersburg and Strattanville; Part of CLEARFIELD County consisting of the township of Falls Creek; All of CLINTON County, Part of CRAWFORD County consisting of the CITY of Titusville and the TOWNSHIPS of Athens, Bloomfield, East Mead, Oil Creek, Randolph, Rome, Sparta, Steuben, Troy and Wayne and the BOROUGHS of Centerville, Cochranton, Hydetown, Spartansburg, Townville; All of ELK County; All of FOREST County; All

of JEFFERSON County; Part of LYCOMING County consisting of the TOWNSHIPS of Anthony, Bastress, Brown, Cogan House, Cummings, Limestone, McHenry, Mifflin, Nippenose, Piatt, Pine, Porter, Susquehanna, Washington and Watson and the BOROUGHS of Jersey Shore and Salladasburg; All of MCKEAN County; All of POTTER County; All of TIOGA County; All of UNION County; All of VENANGO County and All of WARREN County.
Total population: 565,813

Dist. 06 — BERKS, MONTGOMERY, NORTHUMBERLAND and SCHUYLKILL Counties. All of BERKS County; Part of MONTGOMERY County consisting of the TOWNSHIPS of Upper Pottsgrove and West Pottsgrove and the BOROUGH of Pottstown (PART, Districts 01, 02, 03, 04, 05 and 07); Part of NORTHUMBERLAND County consisting of the CITY of Sunbury and the TOWNSHIPS of Delaware, East Chillisquaque, Jackson, Jordan, Little Mahanoy, Lower Augusta, Lower Mahanoy, Point, Rockefeller, Turbot, Upper Augusta, Upper Mahanoy and West Chillisquaque and the BOROUGHS of Herndon, McEwensville, Milton, Northumberland, Riverside, Snydertown and Watsontown and All of SCHUYLKILL County.
Total population: 565,786

Dist. 07 — CHESTER, DELAWARE and MONTGOMERY Counties.
Part of CHESTER County consisting of the TOWNSHIPS of Charlestown, East Pikeland, East Whiteland, Easttown, Schuylkill, Tredyffrin, West Pikeland, West Vincent and Willistown and the BOROUGHS of Malvern, Phoenixville and Spring

City; Part of DELAWARE County consisting of the CITY of Chester (Blocks 201, 207, 208 of 1990 Census Tract 4046) and the TOWNSHIPS of Aston, Bethel, Birmingham, Chester, Concord, Edgemont, Haverford, Lower Chichester, Marple, Middletown, Nether Providence, Newtown, Radnor, Ridley (Excluding Blocks 903 and 919 of 1990 Census Tract 4041.03), Springfield, Thornbury, Upper Chichester, Upper Darby and Upper Providence and the BOROUGHS of Aldan, Brookhaven, Chester Heights, Clifton Heights, Collingdale, East Lansdowne, Marcus Hook, Media, Millbourne, Morton, Norwood, Parkside, Prospect Park, Ridley Park, Rose Valley, Rutledge, Sharon Hill, Swarthmore, Trainer and Upland and Part of MONTGOMERY County consisting of the TOWNSHIP of Upper Merion (Excluding Block 213 of 1990 Census Tract 2059.04) and the BOROUGHS of Bridgeport and Royersford.
Total population: 565,754

Dist. 08 — BUCKS and MONTGOMERY Counties.
All of BUCKS County and Part of MONTGOMERY County consisting of the TOWNSHIPS of Horsham and Lower Moreland (PART, District 04).
Total population: 565,787

Dist. 09 — BEDFORD, BLAIR, CENTRE, CLEARFIELD, FRANKLIN, FULTON, HUNTINGDON, JUNIATA, MIFFLIN, PERRY and SNYDER Counties. All of BEDFORD County; All of BLAIR County; Part of CENTRE County consisting of the TOWNSHIPS of Burnside, Halfmoon, Rush, Snow Shoe, Taylor, Union and Worth and the BOROUGHS of Philipsburg, Port Matilda, Snow Shoe, South Philipsburg and

Unionville; All of CLEARFIELD County except the TOWNSHIP of Falls Creek; All of FRANKLIN County; All of FULTON County; All of HUNTINGDON County; All of JUNIATA County; All of MIFFLIN County; Part of PERRY County consisting of the TOWNSHIPS of Centre, Jackson, North East Madison, Saville, South West Madison, Spring, Toboyne, Tuscarora and Tyrone and the BOROUGHS of Blain, Bloomfield and Landisburg and All of SNYDER County.
Total population: 565,803

Dist. 10 BRADFORD, LACKAWANNA, LYCOMING, MONROE, PIKE, SULLIVAN, SUSQUEHANNA, WAYNE and WYOMING Counties.
All of BRADFORD County; All of LACKAWANNA County; Part of LYCOMING County consisting of the CITY of Williamsport and the TOWNSHIPS of Armstrong, Brady, Cascade, Clinton, Eldred, Fairfield, Franklin, Gamble, Hepburn, Jackson, Jordan, Lewis, Loyalsock, Lycoming, McIntyre, McNett, Mill Creek, Moreland, Muncy, Muncy Creek, Old Lycoming, Penn, Plunketts Creek, Shrewsbury, Upper Fairfield, Wolf and Woodward and the BOROUGHS of Duboistown, Hughesville, Montgomery, Montoursville, Muncy, Picture Rocks and South Williamsport; Part of MONROE County consisting of the TOWNSHIPS of Barrett, Coolbaugh, Jackson, Middle Smithfield, Paradise, Pocono, Price and Smithfield and the BOROUGHS of Delaware Water Gap, East Stroudsburg (PART, Districts 02 and 03) and Mt. Pocono; All of PIKE County; All of SULLIVAN County; All of SUSQUEHANNA County; All of WAYNE County and All of WYOMING County.
Total population: 565,796

Dist. 11

CARBON, COLUMBIA, LUZERNE, MONROE, MONTOUR and NORTHUMBERLAND Counties. All of CARBON County; All of COLUMBIA County; All of LUZERNE County; Part of MONROE County consisting of the TOWNSHIPS of Chestnuthill, Eldred, Hamilton, Polk, Ross, Stroud, Tobyhanna and Tunkhannock and the BOROUGHS of East Stroudsburg (PART, Districts 01, 04, 05 and 06) and Stroudsburg; All of MONTOUR County and Part of NORTHUMBERLAND County consisting of the CITY of Shamokin and the TOWNSHIPS of Coal, East Cameron, Lewis, Mt. Carmel, Ralpho, Rush, Shamokin, Washington, West Cameron and Zerbe and the BOROUGHS of Kulpmont, Marion Heights, Mt. Carmel and Turbotville.
Total population: 565,798

Dist. 12

ARMSTRONG, CAMBRIA, CLARION, FAYETTE, INDIANA, SOMERSET and WESTMORELAND Counties.
Part of ARMSTRONG County consisting of the TOWNSHIPS of Bethel, Boggs, Bradys Bend, Burrell, Cadogan, Cowanshannock, East Franklin, Gilpin, Hovey, Kiskiminetas, Kittanning, Mahoning, Manor, North Buffalo, Parks, Perry, Pine, Plumcreek, Rayburn, Redbank, South Bend, South Buffalo, Sugarcreek, Valley, Washington, Wayne and West Franklin and the BOROUGHS of Apollo, Applewold, Atwood, Dayton, Elderton, Ford City, Ford Cliff, Freeport, Kittanning, Leechburg, Manorville, North Apollo, Parker City, Rural Valley, South Bethlehem, West Kittanning and Worthington; All of CAMBRIA County; Part of CLARION County consisting of the BOROUGH of New Bethlehem; Part of FAYETTE County consisting of the CITY of Connellsville

and the TOWNSHIPS of Connellsville, Dunbar, Georges, Henry Clay, North Union, Springfield, Stewart and Wharton and the BOROUGHS of Dunbar, Fairchance, Markleysburg, Ohiopyle, Smithfield, South Connellsville and Vanderbilt; All of INDIANA County; All of SOMERSET County and Part of WESTMORELAND County consisting of the TOWNSHIPS of Bell, Cook, Derry, Donegal, East Huntingdon, Fairfield, Ligonier, Loyalhanna, Mt. Pleasant, St. Clair and Unity and the BOROUGHS of Avonmore, Bolivar, Derry, Donegal, Latrobe, Laurel Mountain, Ligonier, Mt. Pleasant, New Alexandria, New Florence, Oklahoma, Scottdale, Seward, West Leechburg and Youngstown.
Total population: 565,794

Dist. 13 MONTGOMERY County.
Part of MONTGOMERY County consisting of the TOWNSHIPS of Abington, Cheltenham, East Norriton, Franconia, Hatfield, Limerick, Lower Frederick, Lower Gwynedd, Lower Merion, Lower Moreland (PART, Districts 01, 02, 03, 05 and 06), Lower Pottsgrove, Lower Providence, Lower Salford, Marlborough, Montgomery, Perkiomen, Plymouth, Salford, Skippack, Springfield, Towamencin, Upper Dublin, Upper Gwynedd, Upper Merion (Block 213 of 1990 Census Tract 2059.04), Upper Moreland, Upper Providence, Upper Salford, West Norriton, Whitemarsh, Whitpain and Worcester and the BOROUGHS of Ambler, Bryn Athyn, Collegeville, Conshohocken, Hatboro, Hatfield, Jenkintown, Lansdale, Narberth, Norristown, North Wales, Pottstown (PART, District 06), Rockledge, Schwenksville, Souderton, Telford (Montgomery County Portion), Trappe and West Conshohocken.

Total population: 565,767

Dist. 14 ALLEGHENY County.
Part of ALLEGHENY County consisting of the CITY of Pittsburgh and the TOWNSHIPS of Aleppo, Collier, Hampton, Kennedy, Kilbuck, Leet, McCandless, Neville, Ohio, Robinson, Ross and Stowe and the BOROUGHS of Avalon, Bell Acres, Bellevue, Ben Avon, Ben Avon Heights, Crafton, Edgewood, Emsworth, Franklin Park, Green Tree, Homestead, Ingram, Leetsdale, McKees Rocks, Mt. Oliver, Pennsbury Village, Rosslyn Farms, Sewickley Heights, Sewickley Hills, Thornburg and West View.
Total population: 565,787

Dist. 15 LEHIGH, MONTGOMERY and NORTHAMPTON Counties.
All of LEHIGH County; Part of MONTGOMERY County consisting of the TOWNSHIPS of Douglass, New Hanover, Upper Frederick and Upper Hanover and the BOROUGHS of East Greenville, Green Lane, Pennsburg and Red Hill and All of NORTHAMPTON County.
Total population: 565,810

Dist. 16 CHESTER and LANCASTER Counties.
Part of CHESTER County consisting of the CITY of Coatesville and the TOWNSHIPS of Birmingham, Caln, East Bradford, East Brandywine, East Caln, East Coventry, East Fallowfield, East Goshen, East Marlborough, East Nantmeal, East Nottingham, East Vincent, Elk, Franklin, Highland, Honeybrook, Kennett, London Britain, London Grove, Londonderry, Lower Oxford, New Garden, New London, Newlin, North Coventry, Penn, Pennsbury, Pocopson, Sadsbury,

South Coventry, Thornbury, Upper Oxford, Upper Uwchlan, Uwchlan, Valley, Wallace, Warwick, West Bradford, West Brandywine, West Caln, West Fallowfield, West Goshen, West Marlborough, West Nantmeal, West Nottingham, West Sadsbury, West Whiteland and Westtown and the BOROUGHS of Atglen, Avondale, Downingtown, Elverson, Honey Brook, Kennett Square, Modena, Oxford, Parkesburg, South Coatesville, West Chester and West Grove and Part of LANCASTER County consisting of the CITY of Lancaster and the TOWNSHIPS of Bart, Brecknock, Caernarvon, Colerain, Drumore, Earl, East Cocalico, East Drumore, East Earl, East Hempfield (PART, Districts Barrcrest (1990), Centerville (1990), Cherry Hill (1990), Chestnut Ridge (1990), Friendly (1990), Golden Acres (1990), Kings (1990), Landisville (1990), Petersburg (1990), Pleasant View (1990) and Rohrerstown (1990), East Lampeter, Eden, Fulton, Lancaster, Leacock, Little Britain, Manheim, Martic, Paradise, Pequea, Providence, Sadsbury, Salisbury, Strasburg, Upper Leacock, Warwick, West Cocalico, West Earl and West Lampeter and the BOROUGHS of Adamstown (Lancaster County Portion), Christiana, Denver, East Petersburg, Litiz, Millersville, New Holland, Quarryville, Strasburg and Terre Hill.
Total population: 565,804

Dist. 17 CUMBERLAND, DAUPHIN, LANCASTER, LEBANON and PERRY Counties.
Part of CUMBERLAND County consisting of the TOWNSHIPS of East Pennsboro, Hampden (PART, Precincts 02a, 02b, 03, 04 and 05) and Silver Spring and the BOROUGHS of

Mechanicsburg and Shiremanstown; All of DAUPHIN County; Part of LANCASTER County consisting of the TOWNSHIPS of Clay, Conestoga, Conoy, East Donegal, East Hempfield (PART, Districts Hempland (1990), Indian Springs (1990), Millcreek (1990) and Scotland (1990)), Elizabeth, Ephrata, Manor, Mt. Joy, Penn, Rapho, West Donegal and West Hempfield and the BOROUGHS of Akron, Columbia, Elizabethtown, Ephrata, Manheim, Marietta, Mountville and Mt. Joy; All of LEBANON County and Part of PERRY County consisting of the TOWNSHIPS of Buffalo, Carroll, Greenwood, Howe, Juniata, Liverpool, Miller, Oliver, Penn, Rye, Watts and Wheatfield and the BOROUGHS of Duncannon, Liverpool, Marysville, Millerstown, New Buffalo and Newport.

Total population: 565,817

Dist. 18

ALLEGHENY County.

Part of ALLEGHENY County consisting of the CITIES of Clairton, Duquesne and McKeesport and the TOWNSHIPS of Baldwin, Elizabeth, Forward, Harmar, Indiana, Mt. Lebanon, North Versailles, O'Hara, Penn Hills, Reserve, Scott, Shaler, South Park, South Versailles, Springdale and Wilkins and the BOROUGHS of Aspinwall, Baldwin, Blawnox, Braddock, Braddock Hills, Brentwood, Carnegie, Castle Shannon, Chalfant, Churchill, Dormont, Dravosburg, East McKeesport, East Pittsburgh, Elizabeth, Etna, Forest Hills, Fox Chapel, Glassport, Heidelberg, Jefferson, Liberty, Lincoln, Millvale, Monroeville, Munhall, North Braddock, Oakmont, Pitcairn, Pleasant Hills, Port Vue, Rankin, Sharpsburg, Springdale, Swissvale, Trafford (Allegheny County Portion), Turtle Creek, Verona, Versailles, Wall, West Elizabeth, West

Homestead, West Mifflin, Whitaker, White Oak, Whitehall, Wilkinsburg and Wilmerding.
Total population: 565,781

Dist. 19 — ADAMS, CUMBERLAND and YORK Counties.
All of ADAMS County; Part of CUMBERLAND County consisting of the TOWNSHIPS of Cooke, Dickinson, Hampden (PART, Precincts 01 North and 01 South), Hopewell, Lower Allen, Lower Frankford, Lower Mifflin, Middlesex, Monroe, North Middleton, North Newton, Penn, Shippensburg, South Middleton, South Newton, Southampton, Upper Allen, Upper Frankford, Upper Mifflin and West Pennsboro and the BOROUGHS of Camp Hill, Carlisle, Lemoyne, Mt. Holly Springs, New Cumberland, Newburg, Newville, Shippensburg (Cumberland County Portion), West Fairview and Wormleysburg and All of YORK County.
Total population: 565,779

Dist. 20 — ALLEGHENY, FAYETTE, GREENE, WASHINGTON and WESTMORELAND Counties.
Part of ALLEGHENY County consisting of the TOWNSHIPS of Crescent, Findlay, Moon, North Fayette, South Fayette and Upper St. Clair and the BOROUGHS of Bethel Park, Bridgeville, Coraopolis, Edgeworth, Glenfield, Haysville, McDonald (Allegheny County Portion), Oakdale, Osborne and Sewickley; Part of FAYETTE County consisting of the CITY of Uniontown and the TOWNSHIPS of Brownsville, Bullskin, Franklin, German, Jefferson, Lower Tyrone, Luzerne, Menallen, Nicholson, Perry, Redstone, Saltlick, South Union, Springhill, Upper Tyrone and Washington and the BOROUGHS of Belle Vernon,

Brownsville, Dawson, Everson, Fayette City, Masontown, Newell, Perryopolis and Point Marion; All of GREENE County; All of WASHINGTON County and Part of WESTMORELAND County consisting of the CITIES of Greensburg and Monessen and the TOWNSHIPS of Hempfield, Rostraver, Sewickley and South Huntingdon and the BOROUGHS of Adamsburg, Arona, Hunker, Madison, New Stanton, North Belle Vernon, Smithton, South Greensburg, Southwest Greensburg, Sutersville, West Newton and Youngwood.

Total population: 565,815

Dist. 21

BUTLER, CRAWFORD, ERIE and MERCER Counties.

Part of BUTLER County consisting of the CITY of Butler and the TOWNSHIPS of Allegheny, Brady, Butler, Center, Cherry, Clay, Clearfield, Concord, Connoquenessing, Donegal, Fairview, Forward, Franklin, Jefferson, Lancaster, Marion, Mercer, Muddycreek, Oakland, Parker, Penn, Slippery Rock, Summit, Venango, Washington, Winfield and Worth and the BOROUGHS of Bruin, Callery, Cherry Valley, Chicora, Connoquenessing, East Butler, Eau Claire, Evans City, Fairview, Harrisville, Karns City, Petrolia, Portersville, Prospect, Slippery Rock, West Liberty and West Sunbury; Part of CRAWFORD County consisting of the CITY of Meadville and the TOWNSHIPS of Beaver, Cambridge, Conneaut, Cussewago, East Fairfield, East Fallowfield, Fairfield, Greenwood, Hayfield, North Shenango, Pine, Richmond, Rockdale, Sadsbury, South Shenango, Spring, Summerhill, Summit, Union, Venango, Vernon, West Fallowfield, West Mead, West Shenango and Woodcock and the BOROUGHS of Blooming

Valley, Cambridge Springs, Conneaut Lake, Conneautville, Linesville, Saegertown, Springboro, Venango and Woodcock; All of ERIE County and All of MERCER County.
Total population: 565,802

Population of all districts: 11,881,643

APPENDIX B

PROPOSED REVISED ELECTION CALENDAR FOR REPRESENTATIVE IN UNITED STATES CONGRESS AND DELEGATE AND ALTERNATE DELEGATE TO NATIONAL CONVENTIONS

Date of Supreme Court's Final Order in Mellow v. Mitchell, No. 7 M.D. Misc. Dkt. 1992	First legal day to circulate and file nomination petitions
Within 24 hours after date of Supreme Court's final order	Secretary of the Commonwealth will send to the county boards of elections a written notice announcing that candidates are to be nominated at the April 28, 1992 primary for the office of Representative in Congress
Within 24 hours after date that political parties have filed their apportionment of delegates and alternate delegates among the congressional districts	Secretary of the Commonwealth will send to the county boards of elections a written notice announcing that candidates are to be elected at the April 28, 1992 primary for the party offices of Delegate and Alternate Delegate to the National conventions of the political parties and designating the number of such offices to be elected in each congressional district

No later than 7 days after Supreme Court's Final Order in Mellow	The county boards of elections will publish a notice in newspapers that nominations of candidates for Representative in Congress will be made and that elections of persons to the party offices of Delegate and Alternate Delegate to National conventions of the political parties will occur at the April 28, 1992 General Primary, such notice to specify that the Court has established a deadline of March 13, 1992 by which nomination petitions for such offices must be filed
March 13	Last day to circulate and file nomination petitions
March 14	First legal day to circulate nomination papers nominating independent candidates of political bodies or candidates of minor political parties
March 16	First legal day to file nomination papers nominating independent candidates of political bodies or candidates of minor political parties

March 16	Secretary of the Commonwealth will transmit to each county board of elections a list of all candidates for Representative in Congress and Delegate or Alternate Delegate to National conventions who have filed nomination petitions with her and who are not known to have withdrawn or been disqualified
March 16	The county boards of elections will deliver or mail to qualified electors who previously have been sent special write-in absentee ballots an additional list containing the names of all candidates for Representative in Congress or Delegate or Alternate Delegate to National Conventions who have been named in nomination petitions filed with the Secretary
March 19	Last day to file objections to nomination petitions
March 23	Last day for candidates who have filed nomination petitions to withdraw
March 27	Last day, if possible, that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions

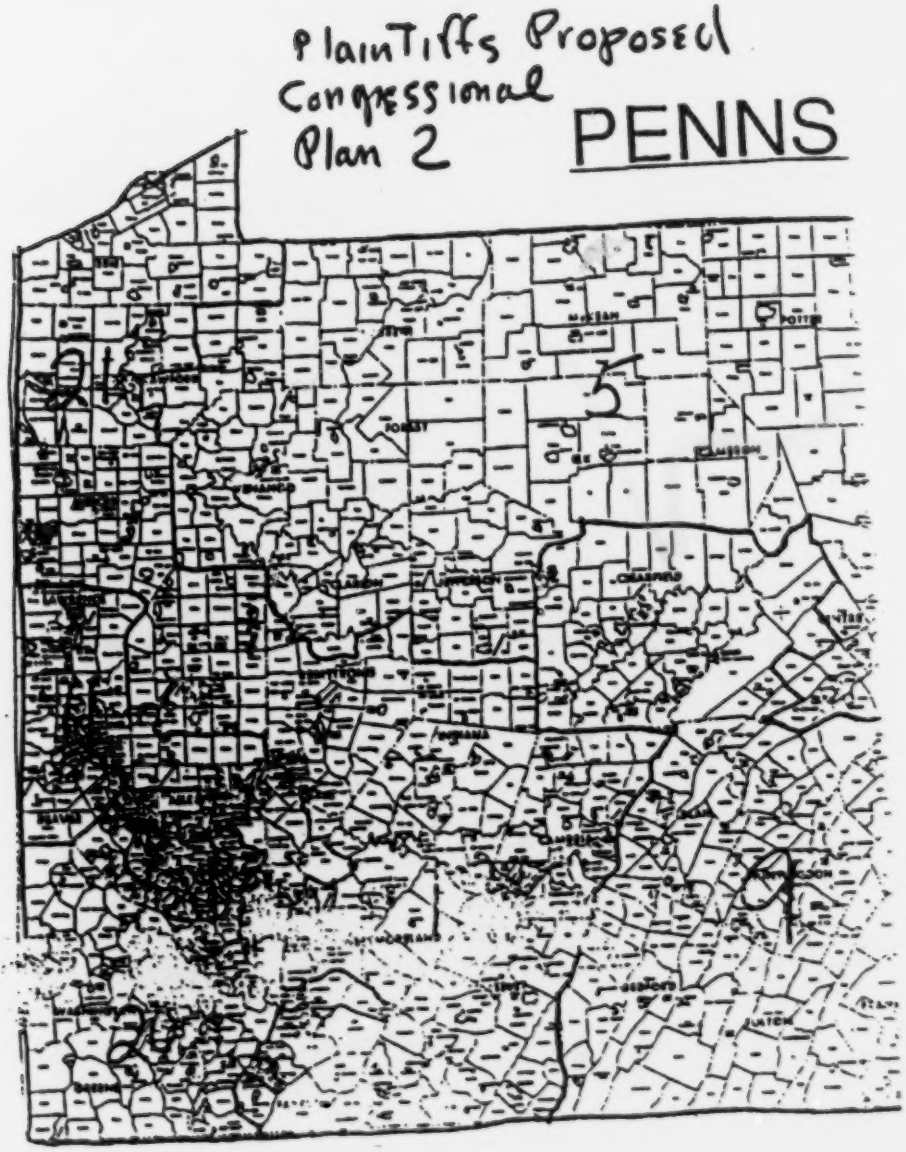
March 30	Last day, if possible, for Commonwealth Court to render decisions in cases involving objections to nomination petitions

APPENDIX C

REVISED PRIMARY ELECTION CALENDAR FOR SENATOR AND REPRESENTATIVE IN THE GENERAL ASSEMBLY

March 6	Last day to circulate and file nomination petitions
March 6	Last day for candidates to file Statements of Financial Interests with the State Ethics Commission
March 13	Last day to file objections to nomination petitions
March 23	Last day for candidates who have filed nomination petitions for the primary election to withdraw
March 27	Last day, if possible, that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions
March 30	Last day, if possible, for Commonwealth Court to render decisions in cases involving objections to nomination petitions

MAP

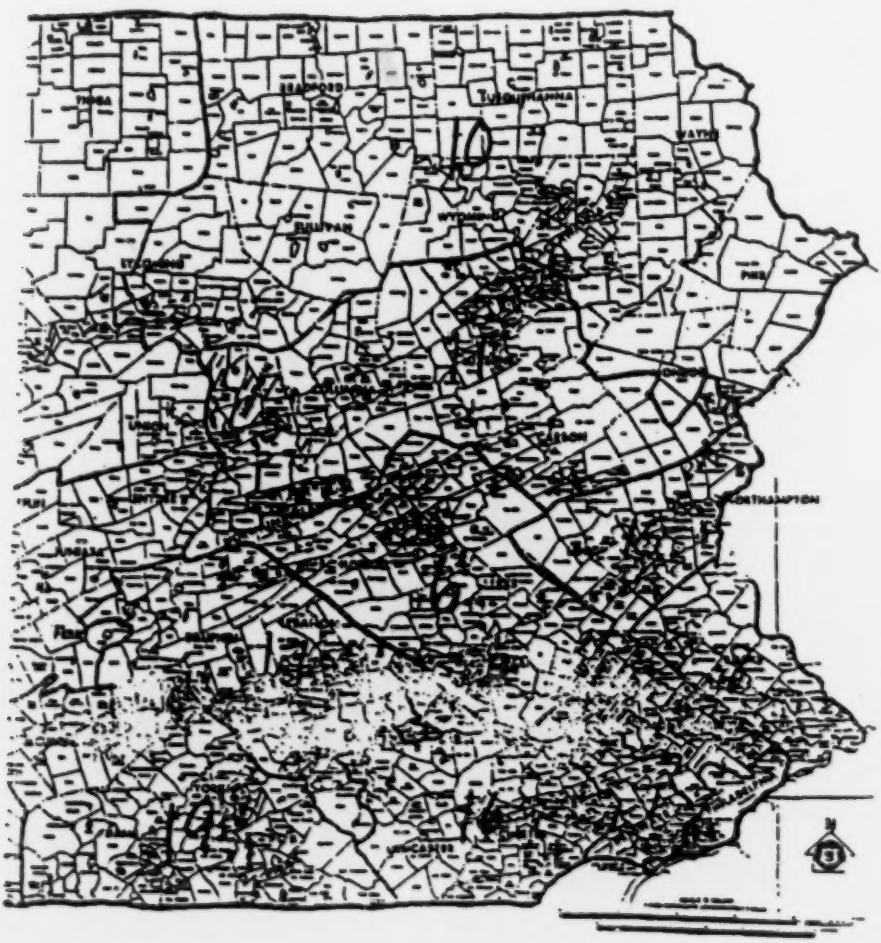


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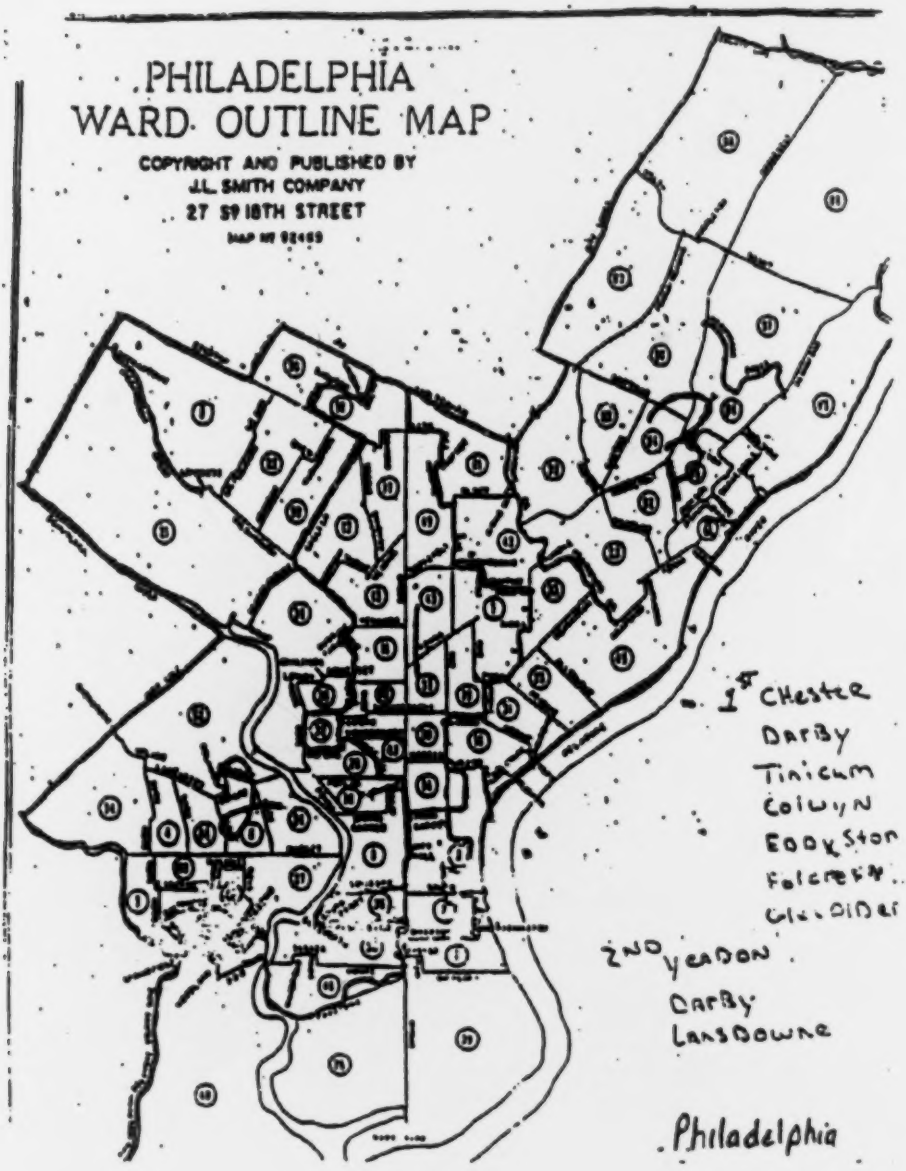
MAP

Plaintiffs Proposed CRT 2
Congressional Plan 2

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APPENDIX "B"

J-57-1992

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ROBERT J. MELLOW, Senator, 22nd District, J. WILLIAM LINCOLN, Senator, 32nd District, LEONARD J. BODACK, Senator, 38th District, MICHAEL J. O'PAKE, Senator, 11th District, PATRICK J. STAPLETON, Senator, 41st District, JEANETTE F. REIBMAN, Senator, 18th District, VINCENT J. FUMO, Senator, 1st District, and H. CRAIG LEWIS, Senator, 6th District, Individually and in their official capacities,	:	No. 7 M.D. Misc. Docket
Appellants	:	
v.	:	
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, in their official capacities only,	:	
Appellees	:	ARGUED: March 7, 1992

ORDER

PER CURIAM

AND NOW, this 10th day of March, 1992, pursuant to hearing held upon complaint, it is hereby ORDERED as follows:

1. The Petition to Intervene filed on behalf of State Senator James C. Greenwood, Andrew L. Warren, Mark S. Schweiker, and Sandra A. Miller is granted. The Petition of Edward J. Wilkes, Jr., Barbara Frailey, William A. Wall, William M. Keim, III, Justus C. Barber, Patricia Anne Buard, and Russell U. McLaughlin for Leave to Intervene is granted.

2. The exception to President Judge David W. Craig's Findings, Recommended Decision, and Form of Order filed in this matter are dismissed.

3. Section 1801-A of the Election Code, Act of June 3, 1937, P.L. 1333, added March 3, 1982, P.L. 127, §2, 25 P.S. §3571, is hereby declared unconstitutional and its implementation for the purpose of conducting elections to the office of Representative in the United State Congress is hereby permanently enjoined.

4. Such elections, in the primary and general elections in the years 1992, 1994, 1996, 1998 and 2000 shall be conducted in accordance with the Congressional Election Districts described in Appendix A, attached to and hereby made part of this Order, and hereby adopted as the apportionment of the Commonwealth into twenty-one (21) Congressional Districts until the same shall be lawfully changed.

5. The schedule for the primary elections to be held April 28, 1992, for the election of Representatives to the United States Congress and for Delegates and Alternate Delegates to National Conventions, shall be conducted by the Secretary of the

Commonwealth and by all election officers within the Commonwealth in accordance with the Revised Election Calendar attached to this Order as Appendix B, and hereby made part hereof, to provide for an orderly election process.

6. In addition, the Secretary of the Commonwealth shall, as soon as possible, publish in the Pennsylvania Bulletin, by description and, if feasible, by maps, the Congressional Districts hereby adopted in Appendix A.

7. The members of Congress now in office shall continue in the office until expiration of their respective terms.

8. Vacancies now existing or happening after the entry of this Order and before the commencement of the terms of the members elected at the election of 1992 shall be filled for the unexpired terms from the districts formerly prescribed in Section 1801-A of the Election Code, Act of June 3, 1937, P.L. 1333, added March 3, 1982, P.L. 127, §2, 25 P.S. §3571.

9. In the event any municipality or part thereof should be omitted in the description of congressional districts in Appendix A, the municipality or part thereof shall be included as a part of the congressional district which completely surrounds it. Should any omitted municipality or part thereof be not completely surrounded by one congressional district, it shall become a part of that congressional district to which it is contiguous, or if there are two or more such contiguous districts, it shall become a part of that congressional district contiguous thereto which has the least population.

10. All signatures to nominating petitions for candidates for Representative in the United States Congress, and candidates for Delegate and Alternate Delegate to the National conventions of the political parties obtained before the date of this Order are hereby declared to be void and invalid.

11. The two day mail notice required for the casting of lots pursuant to 25 P.S. 2875 is hereby waived.

Opinion to follow.

Mr. Chief Justice Nix, Mr. Justice Larsen and Mr. Justice McDermott did not participate in the consideration or decision of this case.

DISTRICT NUMBER	DESCRIPTION
Dist. 01	DELAWARE and PHILADELPHIA Counties. Part of DELAWARE County consisting of the CITY of Chester (Excluding Blocks 201, 207, 208 of 1990 Census Tract 4046) and the TOWNSHIPS of Darby, Ridley (Blocks 903 and 919 of 1990 Census Tract 4041.03) and Tinicum and the BOROUGHS of Colwyn, Eddystone, Folcroft and Glenolden and Part of PHILADELPHIA County consisting of the CITY of Philadelphia (PART, Wards 01, 02 [PART, Divisions 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 26], 05 [PART, Divisions 02, 03, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 17, 20, 22 and 23], 07, 10, 11, 12, 13, 14, 16, 17, 19, 20, 26, 30, 32, 36 [PART, Divisions 29, 35 and 37], 37, 39, 40, 43, 47, 48 [PART, Divisions 01, 08, 12, 13, 14, 15 and 17] and 49). Total population: 565,802
Dist. 02	DELAWARE and PHILADELPHIA Counties. Part of DELAWARE County consisting of the BOROUGHS of Darby, Lansdowne and Yeadon and Part of PHILADELPHIA County consisting of the CITY of Philadelphia (PART, Wards 03, 04, 06, 08, 09, 15, 21, 22, 24, 27, 28, 29, 34, 36 [PART, Divisions 01, 02, 03, 04, 05, 06, 07, 08, 09, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 30, 31, 32, 33, 34, 36, 38, 39, 40 and 41], 38, 44, 46, 48 [PART, Divisions 02, 03, 04, 05, 06, 07, 09, 10, 11, 16, 18, 19, 20, 21, 22 and 23], 50, 51, 52, 59 and 60). Total population: 565,815

Dist. 03 PHILADELPHIA County.
Part of PHILADELPHIA County consisting of the CITY of Philadelphia (PART, Wards 02 [PART, Divisions 24, 25 and 27], 05 [PART, Divisions 01, 04, 05, 16, 18, 19 and 21], 18, 23, 25, 31, 33, 35, 41, 42, 45, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65 and 66).
Total population: 565,775

Dist. 04 ALLEGHENY, BEAVER, BUTLER, LAWRENCE and WESTMORELAND Counties. Part of ALLEGHENY County consisting of the TOWNSHIPS of East Deer, Fawn, Frazer, Harrison, Marshall, Pine, Richland and West Deer and the BOROUGHS of Brackenridge, Bradford Woods, Cheswick, Plum and Tarentum; All of BEAVER County; Part of BUTLER County consisting of the TOWNSHIPS of Adams, Buffalo, Clinton, Cranberry, Jackson and Middlesex and the BOROUGHS of Harmony, Mars, Saxonburg, Seven Fields, Valencia and Zelienople; All of LAWRENCE County and Part of WESTMORELAND County consisting of the CITIES of Arnold, Jeannette, Lower Burrell and New Kensington and the TOWNSHIPS of Allegheny, North Huntingdon, Penn, Salem, Upper Burrell and Washington and the BOROUGHS of Delmont, East Vandergrift, Export, Hyde Park, Irwin, Manor, Murrysville, North Irwin, Penn, Trafford (Westmoreland County Portion) and Vandergrift.
Total population: 565,792

Dist. 05 ARMSTRONG, CAMERON, CENTRE, CLARION, CLEARFIELD, CLINTON, CRAWFORD, ELK, FOREST, JEFFERSON,

LYCOMING, MCKEAN, POTTER, TIOGA, UNION, VENANGO and WARREN Counties.
Part of ARMSTRONG County consisting of the TOWNSHIP of Madison; All of CAMERON County; Part of CENTRE County consisting of the TOWNSHIPS of Benner, Boggs, College, Curtin, Ferguson, Gregg, Haines, Harris, Howard, Huston, Liberty, Marion, Miles, Patton, Penn, Potter, Spring and Walker and the BOROUGHS of Bellefonte, Centre Hall, Howard, Milesburg, Millheim and State College; Part of CLARION County consisting of the TOWNSHIPS of Ashland, Beaver, Brady, Clarion, Elk, Farmington, Highland, Knox, Licking, Limestone, Madison, Millcreek, Monroe, Paint, Perry, Piney, Porter, Red Bank, Richland, Salem, Toby and Washington and the BOROUGHS of Callensburg, Clarion, East Brady, Foxburg, Hawthorn, Knox, Rimersburg, Shippenville, Sligo, St. Petersburg and Strattanville; Part of CLEARFIELD County consisting of the TOWNSHIP of Falls Creek; All of CLINTON County, Part of CRAWFORD County consisting of the CITY of Titusville and the TOWNSHIPS of Athens, Bloomfield, East Mead, Oil Creek, Randolph, Rome, Sparta, Steuben, Troy and Wayne and the BOROUGHS of Centerville, Cochranton, Hydetown, Spartansburg and Townville; All of ELK County; All of FOREST County; All of JEFFERSON County; Part of LYCOMING County consisting of the TOWNSHIPS of Anthony, Bastress, Brown, Cogan House, Cummings, Limestone, McHenry, Mifflin, Nippenose, Piatt, Pine, Porter, Susquehanna, Washington and Watson and the BOROUGHS of Jersey Shore and Salladasburg; All of MCKEAN County; All of POTTER County; All of TIOGA

County; All of UNION County; All of VENANGO County and All of WARREN County.
Total population: 565,813

Dist. 06 BERKS, MONTGOMERY, NORTHUMBERLAND and SCHUYLKILL Counties.
All of BERKS County; Part of MONTGOMERY County consisting of the TOWNSHIPS of Upper Pottsgrove and West Pottsgrove and the BOROUGH of Pottstown (PART, Districts 01, 02, 03, 04, 05 and 07); Part of NORTHUMBERLAND County consisting of the CITY of Sunbury and the TOWNSHIPS of Delaware, East Chillisquaque, Jackson, Jordan, Little Mahanoy, Lower Augusta, Lower Mahanoy, Point, Rockefeller, Turbot, Upper Augusta, Upper Mahanoy and West Chillisquaque and the BOROUGHS of Herndon, McEwensville, Milton, Northumberland, Riverside, Snydertown and Watsontown and All of SCHUYLKILL County.
Total population: 565,786

Dist. 07 CHESTER, DELAWARE and MONTGOMERY Counties.
Part of CHESTER County consisting of the TOWNSHIPS of Charlestown, East Pikeland, East Whiteland, Easttown, Schuylkill, Tredyffrin, West Pikeland, West Vincent and Willistown and the BOROUGHS of Malvern, Phoenixville and Spring City; Part of DELAWARE County consisting of the CITY of Chester (Blocks 201, 207, 208 of 1990 Census Tract 4046) and the TOWNSHIPS of Aston, Bethel, Birmingham, Chester, Concord, Edgemont, Haverford, Lower Chichester, Marple, Middletown, Nether Providence, Newtown, Radnor, Ridley (Excluding Blocks 903 and 919 of 1990 Census Tract 4041.03), Springfield,

Thornbury, Upper Chichester, Upper Darby and Upper Providence and the BOROUGHS of Aldan, Brookhaven, Chester Heights, Clifton Heights, Collingdale, East Lansdowne, Marcus Hook, Media, Millbourne, Morton, Norwood, Parkside, Prospect Park, Ridley Park, Rose Valley, Rutledge, Sharon Hill, Swarthmore, Trainer and Upland and Part of MONTGOMERY County consisting of the TOWNSHIP of Upper Merion (Excluding Block 213 of 1990 Census Tract 2059.04) and the BOROUGHS of Bridgeport and Royersford.
Total population: 565,754

Dist. 08 — BUCKS and MONTGOMERY Counties.
All of BUCKS County and Part of MONTGOMERY County consisting of the TOWNSHIPS of Horsham and Lower Moreland (PART, District 04).
Total population: 565,787

Dist. 09 — BEDFORD, BLAIR, CENTRE, CLEARFIELD, FRANKLIN, FULTON, HUNTINGDON, JUNIATA, MIFFLIN, PERRY and SNYDER Counties. All of BEDFORD County; All of BLAIR County; Part of CENTRE County consisting of the TOWNSHIPS of Burnside, Halfmoon, Rush, Snow Shoe, Taylor, Union and Worth and the BOROUGHS of Philipsburg, Port Matilda, Snow Shoe, South Philipsburg and Unionville; All of CLEARFIELD County except the TOWNSHIP of Falls Creek; All of FRANKLIN County; All of FULTON County; All of HUNTINGDON County; All of JUNIATA County; All of MIFFLIN County; Part of PERRY County consisting of the TOWNSHIPS of Centre, Jackson, North East Madison, Saville, South West Madison, Spring, Toboyne, Tuscarora and Tyrone

and the BOROUGHS of Blain, Bloomfield and Landisburg and All of SNYDER County.
Total population: 565,803

Dist. 10 BRADFORD, LACKAWANNA, LYCOMING, MONROE, PIKE, SULLIVAN, SUSQUEHANNA, WAYNE and WYOMING Counties.
All of BRADFORD County; All of LACKAWANNA County; Part of LYCOMING County consisting of the CITY of Williamsport and the TOWNSHIPS of Armstrong, Brady, Cascade, Clinton, Eldred, Fairfield, Franklin, Gamble, Hepburn, Jackson, Jordan, Lewis, Loyalsock, Lycoming, McIntyre, McNett, Mill Creek, Moreland, Muncy, Muncy Creek, Old Lycoming, Penn, Plunketts Creek, Shrewsbury, Upper Fairfield, Wolf and Woodward and the BOROUGHS of Duboistown, Hughesville, Montgomery, Montoursville, Muncy, Picture Rocks and South Williamsport; Part of MONROE County consisting of the TOWNSHIPS of Barrett, Coolbaugh, Jackson, Middle Smithfield, Paradise, Pocono, Price and Smithfield and the BOROUGHS of Delaware Water Gap, East Stroudsburg (PART, Districts 02 and 03) and Mt. Pocono; All of PIKE County; All of SULLIVAN County; All of SUSQUEHANNA County; All of WAYNE County and All of WYOMING County.
Total population: 565,796

Dist. 11 CARBON, COLUMBIA, LUZERNE, MONROE, MONTOUR and NORTHUMBERLAND Counties.
All of CARBON County; All of COLUMBIA County; All of LUZERNE County; Part of MONROE County consisting of the TOWNSHIPS of Chestnuthill, Eldred, Hamilton, Polk, Ross, Stroud, Tobyhanna and Tunkhannock and the

BOROUGHS of East Stroudsburg (PART, Districts 01, 04, 05 and 06) and Stroudsburg; All of MONTOUR County and Part of NORTHUMBERLAND County consisting of the CITY of Shamokin and the TOWNSHIPS of Coal, East Cameron, Lewis, Mt. Carmel, Ralpho, Rush, Shamokin, Washington, West Cameron and Zerbe and the BOROUGHS of Kulpmont, Marion Heights, Mt. Carmel and Turbotville.
Total population: 565,798

Dist. 12

ARMSTRONG, CAMBRIA, CLARION, FAYETTE, INDIANA, SOMERSET and WESTMORELAND Counties.
Part of ARMSTRONG County consisting of the TOWNSHIPS of Bethel, Boggs, Bradys Bend, Burrell, Cadogan, Cowanshannock, East Franklin, Gilpin, Hovey, Kiskiminetas, Kittanning, Mahoning, Manor, North Buffalo, Parks, Perry, Pine, Plumcreek, Rayburn, Redbank, South Bend, South Buffalo, Sugarcreek, Valley, Washington, Wayne and West Franklin and the BOROUGHS of Apollo, Applewold, Atwood, Dayton, Elderton, Ford City, Ford Cliff, Freeport, Kittanning, Leechburg, Manorville, North Apollo, Parker City, Rural Valley, South Bethlehem, West Kittanning and Worthington; All of CAMBRIA County; Part of CLARION County consisting of the BOROUGH of New Bethlehem; Part of FAYETTE County consisting of the CITY of Connellsville and the TOWNSHIPS of Connellsville, Dunbar, Georges, Henry Clay, North Union, Springfield, Stewart and Wharton and the BOROUGHS of Dunbar, Fairchance, Markleysburg, Ohiopyle, Smithfield, South Connellsville and Vanderbilt; All of INDIANA County; All of SOMERSET County and Part of WESTMORELAND County consisting

of the TOWNSHIPS of Bell, Cook, Derry, Donegal, East Huntingdon, Fairfield, Ligonier, Loyalhanna, Mt. Pleasant, St. Clair and Unity and the BOROUGHS of Avonmore, Bolivar, Derry, Donegal, Latrobe, Laurel Mountain, Ligonier, Mt. Pleasant, New Alexandria, New Florence, Oklahoma, Scottdale, Seward, West Leechburg and Youngstown.
Total population: 565,794

Dist. 13 MONTGOMERY County.
Part of MONTGOMERY County consisting of the TOWNSHIPS of Abington, Cheltenham, East Norriton, Franconia, Hatfield, Limerick, Lower Frederick, Lower Gwynedd, Lower Merion, Lower Moreland (PART, Districts 01, 02, 03, 05 and 06), Lower Pottsgrove, Lower Providence, Lower Salford, Marlborough, Montgomery, Perkiomen, Plymouth, Salford, Skippack, Springfield, Towamencin, Upper Dublin, Upper Gwynedd, Upper Merion (Block 213 of 1990 Census Tract 2059.04), Upper Moreland, Upper Providence, Upper Salford, West Norriton, Whitemarsh, Whitpain and Worcester and the BOROUGHS of Ambler, Bryn Athyn, Collegeville, Conshohocken, Hatboro, Hatfield, Jenkintown, Lansdale, Narberth, Norristown, North Wales, Pottstown (PART, District 06), Rockledge, Schwenksville, Souderton, Telford (Montgomery County Portion), Trappe and West Conshohocken.
Total population: 565,767

Dist. 14 ALLEGHENY County.
Part of ALLEGHENY County consisting of the CITY of Pittsburgh and the TOWNSHIPS of Aleppo, Collier, Hampton, Kennedy, Kilbuck, Leet, McCandless, Neville, Ohio, Robinson, Ross

and Stowe and the BOROUGHS of Avalon, Bell Acres, Bellevue, Ben Avon, Ben Avon Heights, Crafton, Edgewood, Emsworth, Franklin Park, Green Tree, Homestead, Ingram, Leetsale, McKees Rocks, Mt. Oliver, Pennsbury Village, Rosslyn Farms, Sewickley Heights, Sewickley Hills, Thornburg and West View.
Total population: 565,787

Dist. 15 LEHIGH, MONTGOMERY and NORTHAMPTON Counties.
All of LEHIGH County; Part of MONTGOMERY County consisting of the TOWNSHIPS of Douglass, New Hanover, Upper Frederick and Upper Hanover and the BOROUGHS of East Greenville, Green Lane, Pennsburg and Red Hill and All of NORTHAMPTON County.
Total population: 565,810

Dist. 16 CHESTER and LANCASTER Counties.
Part of CHESTER County consisting of the CITY of Coatesville and the TOWNSHIPS of Birmingham, Caln, East Bradford, East Brandywine, East Caln, East Coventry, East Fallowfield, East Goshen, East Marlborough, East Nantmeal, East Nottingham, East Vincent, Elk, Franklin, Highland, Honeybrook, Kennett, London Britain, London Grove, Londonderry, Lower Oxford, New Garden, New London, Newlin, North Coventry, Penn, Pennsbury, Pocopson, Sadsbury, South Coventry, Thornbury, Upper Oxford, Upper Uwchlan, Uwchlan Valley, Wallace, Warwick, West Bradford, West Brandywine, West Caln, West Fallowfield, West Goshen, West Marlborough, West Nantmeal, West Nottingham, West Sadsbury, West Whiteland and Westtown and the BOROUGHS of Atglen, Avondale,

Downingtown, Elverson, Honey Brook, Kennett Square, Modena, Oxford, Parkesburg, South Coatesville, West Chester and West Grove and Part of LANCASTER County consisting of the CITY of Lancaster and the TOWNSHIPS of Bart, Brecknock, Caernarvon, Colerain, Drumore, Earl, East Cocalico, East Drumore, East Earl, East Hempfield (PART, Districts
Barrcrest (1990), Centerville (1990),
Cherry Hill (1990), Chestnut Ridge (1990),
Friendly (1990), Golden Acres (1990),
Kings (1990), Landisville (1990),
Petersburg (1990), Pleasant View (1990) and
Rohrerstown (1990), East Lampeter, Eden, Fulton, Lancaster, Leacock, Little Britain, Manheim, Martic, Paradise, Pequea, Providence, Sadsbury, Salisbury, Strasburg, Upper Leacock, Warwick, West Cocalico, West Earl and West Lampeter and the BOROUGHS of Adamstown (Lancaster County Portion), Christiana, Denver, East Petersburg, Litiz, Millersville, New Holland, Quarryville, Strasburg and Terre Hill.
Total population: 565,804

Dist. 17 CUMBERLAND, DAUPHIN, LANCASTER, LEBANON and PERRY Counties.
Part of CUMBERLAND County consisting of the TOWNSHIPS of East Pennsboro, Hampden (PART, Precincts 02a, 02b, 03, 04 and 05) and Silver Spring and the BOROUGHS of Mechanicsburg and Shiremanstown; All of DAUPHIN County; Part of LANCASTER County consisting of the TOWNSHIPS of Clay, Conestoga, Conoy, East Donegal, East Hempfield [PART, Districts
Hempland (1990), Indian Springs (1990),
Millcreek (1990) and Scotland (1990)],

Elizabeth, Ephrata, Manor, Mt. Joy, Penn, Rapho, West Donegal and West Hempfield and the BOROUGHS of Akron, Columbia, Elizabethtown, Ephrata, Manheim, Marietta, Mountville and Mt. Joy; All of LEBANON County and Part of PERRY County consisting of the TOWNSHIPS of Buffalo, Carroll, Greenwood, Howe, Juniata, Liverpool, Miller, Oliver, Penn, Rye, Watts and Wheatfield and the BOROUGHS of Duncannon, Liverpool, Marysville, Millerstown, New Buffalo and Newport.
Total population: 565,817

Dist. 18 ALLEGHENY County.
Part of ALLEGHENY County consisting of the CITIES of Clairton, Duquesne and McKeesport and the TOWNSHIPS of Baldwin, Elizabeth, Forward, Harmar, Indiana, Mt. Lebanon, North Versailles, O'Hara, Penn Hills, Reserve, Scott, Shaler, South Park, South Versailles, Springdale and Wilkins and the BOROUGHS of Aspinwall, Baldwin, Blawnox, Braddock, Braddock Hills, Brentwood, Carnegie, Castle Shannon, Chalfant, Churchill, Dormont, Dravosburg, East McKeesport, East Pittsburgh, Elizabeth, Etna, Forest Hills, Fox Chapel, Glassport, Heidelberg, Jefferson, Liberty, Lincoln, Millvale, Monroeville, Munhall, North Braddock, Oakmont, Pitcairn, Pleasant Hills, Port Vue, Rankin, Sharpsburg, Springdale, Swissvale, Trafford (Allegheny County Portion), Turtle Creek, Verona, Versailles, Wall, West Elizabeth, West Homestead, West Mifflin, Whitaker, White Oak, Whitehall, Wilkinsburg and Wilmerding.
Total population: 565,781

Dist. 19 ADAMS, CUMBERLAND and YORK Counties. All of ADAMS County; Part of CUMBERLAND County consisting of the TOWNSHIPS of Cooke, Dickinson, Hampden (PART, Precincts 01 North and 01 South), Hopewell, Lower Allen, Lower Frankford, Lower Mifflin, Middlesex, Monroe, North Middleton, North Newton, Penn, Shippensburg, South Middleton, South Newton, Southampton, Upper Allen, Upper Frankford, Upper Mifflin and West Pennsboro and the BOROUGHS of Camp Hill, Carlisle, Lemoyne, Mt. Holly Springs, New Cumberland, Newburg, Newville, Shippensburg (Cumberland County Portion), West Fairview and Wormleysburg and All of YORK County.
Total population: 565,779

Dist. 20 ALLEGHENY, FAYETTE, GREENE, WASHINGTON and WESTMORELAND Counties.
Part of ALLEGHENY County consisting of the TOWNSHIPS of Crescent, Findlay, Moon, North Fayette, South Fayette and Upper St. Clair and the BOROUGHS of Bethel Park, Bridgeville, Coraopolis, Edgeworth, Glenfield, Haysville, McDonald (Allegheny County Portion), Oakdale, Osborne and Sewickley; Part of FAYETTE County consisting of the CITY of Uniontown and the TOWNSHIPS of Brownsville, Bullskin, Franklin, German, Jefferson, Lower Tyrone, Luzerne, Menallen, Nicholson, Perry, Redstone, Saltlick, South Union, Springhill, Upper Tyrone and Washington and the BOROUGHS of Belle Vernon, Brownsville, Dawson, Everson, Fayette City, Masontown, Newell, Perryopolis and Point Marion; All of GREENE County; All of WASHINGTON County and Part of WESTMORELAND County

consisting of the CITIES of Greensburg and Monessen and the TOWNSHIPS of Hempfield, Rostraver, Sewickley and South Huntingdon and the BOROUGHS of Adamsburg, Arona, Hunker, Madison, New Stanton, North Belle Vernon, Smithton, South Greensburg, Southwest Greensburg, Sutersville, West Newton and Youngwood.
Total population: 565,815

Dist. 21 BUTLER, CRAWFORD, ERIE and MERCER Counties.
Part of BUTLER County consisting of the CITY of Butler and the TOWNSHIPS of Allegheny, Brady, Butler, Center, Cherry, Clay, Clearfield, Concord, Connoquenessing, Donegal, Fairview, Forward, Franklin, Jefferson, Lancaster, Marion, Mercer, Muddycreek, Oakland, Parker, Penn, Slippery Rock, Summit, Venango, Washington, Winfield and Worth and the BOROUGHS of Bruin, Callery, Cherry Valley, Chicora, Connoquenessing, East Butler, Eau Claire, Evans City, Fairview, Harrisville, Karns City, Petrolia, Portersville, Prospect, Slippery Rock, West Liberty and West Sunbury; Part of CRAWFORD County consisting of the CITY of Meadville and the TOWNSHIPS of Beaver, Cambridge, Conneaut, Cussewago, East Fairfield, East Fallowfield, Fairfield, Greenwood, Hayfield, North Shenango, Pine, Richmond, Rockdale, Sadsbury, South Shenango, Spring, Summerhill, Summit, Union, Venango, Vernon, West Fallowfield, West Mead, West Shenango and Woodcock and the BOROUGHS of Blooming Valley, Cambridge Springs, Conneaut Lake, Conneautville, Linesville, Saegertown, Springboro, Venango and Woodcock; All of ERIE County and All of MERCER County.

Total population: 565,802

Population of all districts: 11,881,643

REVISED ELECTION CALENDAR FOR REPRESENTATIVE IN UNITED STATES CONGRESS AND DELEGATE AND ALTERNATE DELEGATE TO NATIONAL CONVENTIONS

March 10	First legal day to circulate and file nomination petitions
March 11	Secretary of the Commonwealth will send to the county boards of elections a written notice announcing that candidates are to be nominated at the April 28, 1992 primary for the office of Representative in Congress
March 11	Secretary of the Commonwealth will send to the county boards of elections a written notice announcing that candidates are to be elected at the April 28, 1992 primary for the party offices of Delegate and Alternate Delegate to the National conventions of the political parties and designating the number of such offices to be elected in each congressional district

March 17	The county boards of elections will publish a notice in newspapers that nominations of candidates for Representative in Congress will be made and that elections of persons to the party offices of Delegate and Alternate Delegate to National conventions of the political parties will occur at the April 28, 1992 General Primary, such notice to specify that the Court has established a deadline of March 19, 1992 by which nomination petitions for such offices must be filed
March 19	Last day to circulate and file nomination petitions
March 20	First legal day to circulate nomination papers nominating independent candidates of political bodies or candidates of minor political parties

March 20	First legal day to file nomination papers nominating independent candidates of political bodies or candidates of minor political parties
March 20	Secretary of the Commonwealth will transmit to each county board of elections a list of all candidates for Representative in Congress and Delegate or Alternate Delegate to National conventions who have filed nomination petitions with the Secretary of the Commonwealth and who are not known to have withdrawn or been disqualified
March 23	The county boards of elections will deliver or mail to qualified electors who previously have been sent special write-in absentee ballots an additional list containing the name of all candidates for Representative in Congress or Delegate or Alternate Delegate to National conventions who have been named in nomination petitions filed with the Secretary
March 24	Last day for candidates who have filed nomination petitions to withdraw

March 25	Last day to file objections to nomination petitions
March 31	Last day that may be fixed by the Commonwealth Court for hearings on objections that have been filed to nomination petitions
April 3	Last day for Commonwealth Court to render decisions in cases involving objections to nomination petitions
May 8	Last day for acceptance of absentee ballots for all elections

APPENDIX "C"

EXCEPTIONS

A. Exceptions of F. JOSEPH LOEPER, et al.

1) Erred in enforcing an arbitrary deadline for submission of redistricting plan.

2) Finding of Fact 15 is erroneous insofar as it characterizes the proceeding involving the amended version of the Loeper Plan.

3) Erred in excluding the amended Loeper Plan for consideration.

4) Finding of Fact 16 is erroneous in that the record contains no evidence to support the findings as to party registration balance for all the listed statewide plans, except the Loeper Plan. Finding of Fact 16 is also erroneous in stating the maximum and average deviation of the Murtha-McDade Plan as well as in stating the number of precincts split by that plan as being 22 rather than 30.

5) Fails to make adequate findings regarding the protection of minority voting rights from dilution.

6) Erred in failing to make findings regarding the dilution in minority population that would be effected in Allegheny County by all statewide plans accepted for consideration.

7) Erred in the legal standard applied to the selection process. Standard used was one arguably appropriate for legislatively enacted reapportionment plans. Master should have

selected a plan that approach :d equality of population as nearly as practicable while also protecting voting rights.

8) The recommended plan by the Master has an unacceptably high deviation from equal population.

9) Erred in relying on maximum and average deviation for the selected plan.

10) Erred in recommending a plan for Allegheny County that produces a result contrary to the Findings of Fact at Nos. 27 and 28.

11) Erred in recommending the elimination of the present 5th District and in effectively eliminating the present 18th District since every other district west of the Alleghenies suffered a greater population decline.

12) Erred in <u>not</u> recommending the adoption of the amended Loeper Plan.

Intervenors request the adoption of the amended Loeper Plan or the Court to design its own plan re remand to the Master for further proceedings.

B. Exceptions of MATTHEW J. RYAN, et al.

1.) Erred in using artificial deadlines to exclude plans and amendments filed after the February 11, 1992 date.

2) Erred in excluding consideration of the Ryan-Cornell Plan first offered publicly in the House on February 11, 1992.

3) Erred in choosing a plan having an unacceptable maximum range of deviation, which dilutes minority voting strength

in District 2 in Philadelphia and District 14 in Allegheny County, fragments municipalities and is not compact nor contiguous.

4) Erred in permitting an incomplete record be made on the dilution of minority voting strength.

Joins with Loeper Exceptions Nos. 1, 2, 3, 4, 5, 7, 8, 9, 10 and 11.

5) Argues that their plan is superior to the Loeper Plan.

C. Exceptions of ROBERT W. O'DONNELL

1) Erred by ignoring constitutional requirement of using the lowest population deviation practicable in favor of a standard of "acceptability in terms of population equality."

2) Erred by treating all the submitted plans as having the same population deviation. Argues that the Plaintiffs' Plan No. 2 deviation could have been further reduced by selecting the O'Donnell Plan B.

3) Erred in interpreting and applying the federal Voting Rights Act in concluding that it is required to create minority-in-the-majority districts. Argues that the record reflects the conclusion that two black majority districts can be created.

4) Recommended plan dilutes minority voting strength in the Second Congressional District in violation of Section 2 of the Voting Rights Act.

5) Erred by equating subjective expressions of "regional interest" with constitutional requirements of population equality.

6) Erred in determining that the Murtha-McDade Plan is the only bi-partisan plan.

7) Erred in finding for a second African-American majority district in Philadelphia based on population proportions.

8) Erred by not correcting reported deviation adjustments.

D. Exceptions to EDWARD J. WILKES, JR., et al.

1) Division of Township of Upper Merion into two congressional districts violates Article I, Section 2 and the First and Fourteenth Amendments, Article I, Sections 5 and 26 of the Pennsylvania Constitution since the plan fragments the Township of Upper Merion; disenfranchises voters and interferes with voters' right to free and equal elections.

2) Upper Merion division violates the First, Fifth and Fourteenth Amendments, Article I, Section 5 of the Pennsylvania Constitution because it forces the Township to spend additional time and money to establish liaison for two separate representatives for 109 residents in a district separate from the remainder of the Township.

3) Upper Merion division violates the Fourteenth Amendment because it is not supported by a rational basis or related to any necessary governmental interest.

4) Impairs voters' rights in violation of the First and Fourteenth Amendments because the division results in unnecessary expense in conducting elections, financing and staffing campaigns and might lead to confusion in voting.

5) Erred by not considering the hardship the recommended plan would have on the Township.

E. Exceptions of Amicus Curiae, THOMAS A. FOGLIETTA, et al.

Argues for remand for a new plan which was also submitted.

F. Submission of Intervenors, JOHN P. MURTHA and JOSEPH W. McDADE

They argue:

1) The bi-partisan statewide congressional plan is constitutionally preferable to party caucus plans prepared for partisan political advantage.

2) Only the bi-partisan plan accomplishes the constitutionally-mandated minimum deviation of less than one person per district.

3) There is no evidence in the record to implicate the provisions of the Voting Rights Act as respects the present configuration of the Second Congressional District in Philadelphia.

4) The bi-partisan plan complies with the policies of the Voting Rights Act.

G. Amicus Curiae, WILLIAM H. LAMB

Argues against the splitting of Chester County in Plaintiffs' Plan No. 2.

H. Amicus Curiae, JOHN B. FULMER

Argues against the splitting of communities in Allegheny County in Plaintiffs' Plan No. 2.

IN THE COMMONWEALTH OF PENNSYLVANIA

ROBERT J. MELLOW, Senator, 22nd District et al., Plaintiffs	:	
v.	:	No. 25 M.D. 1992
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth et al., Defendants	:	

ORDER

AND NOW, this 30th day of January, 1992, upon consideration of Plaintiffs' motion for a preliminary injunction, the stipulation entered into between Plaintiffs and Defendants, and following argument on the question it is hereby ordered:

1) Plaintiffs' motion for a preliminary injunction is hereby granted. The Act of June 3, 1937, P.L. 1333, as amended by the Act of March 3, 1982, P.L. 127, as amended 25 P.S. §3571, is unconstitutional as violative of the one person, one vote principle. Defendants, and any and all persons acting in concert with the Defendants, are enjoined from exercising their powers relating to the administration or supervision of congressional or district level delegate elections under the above cited statute.

2) Because the election schedule cannot commence using the districts created by 25 P.S. §3571, the implementation and enforcement of the following: the Act of April 28, 1978, P.L. 202 §2(a), as amended, 25 P.S. §2751; the Act of December 22, 1971, P.L. 613 [sic], §1, as amended, 25 P.S. §2753(a); the Act of August 13, 1963, P.L. 707, §12, as amended, 25 P.S. §2868; and the Act of July 21, 1979, P.L. 189, §2, as amended, 25 P.S.

§2873(d), which set forth the election schedule described in ¶16 of the Complaint, are enjoined until such time as the General Assembly has enacted a congressional redistricting plan that complies with Article I, Section 2 of the United States Constitution, Article I, Section 5 of the Pennsylvania Constitution, and all other applicable legal requirements.

3) This Court retains jurisdiction to ensure that a constitutionally valid congressional redistricting plan will be implemented in time for the 1992 elections. All named parties and any properly admitted intervenors (if any) shall submit proposed plans on, or before, February 11, 1992. If the General Assembly has not enacted such a plan, and the Governor has not signed into law a plan by February 11, 1992, this Court will begin consideration of all submitted plans and will either implement one of those plans or a plan drawn by this Court for use in the 1992 congressional elections.

4) All interested persons not named as a party to this case must file a motion for intervention prior to submission of a redistricting plan to this Court.

/s/ Francis A. Barry
FRANCIS A. BARRY, Senior Judge

IN THE COMMONWEALTH OF PENNSYLVANIA

ROBERT J. MELLOW, Senator, 22nd District et al., Plaintiffs	:	
v.	:	No. 25 M.D. 1992
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth et al., Defendants	:	

MEMORANDUM ON PROCEDURE
BY PRESIDENT JUDGE CRAIG FILED: February 12, 1992

Although it is to be hoped that the legislature and Governor can enact a valid congressional redistricting bill while this litigation goes on, the court and parties must now proceed with maximum efficiency in the event that does not occur.

As indicated by the order of court to which this memorandum refers, the Commonwealth Court proposes, by a single judge, to consider plans for congressional redistricting in accordance with the 1990 census, commencing at 10:00 a.m. on Thursday, February 13, 1992, at the Harrisburg seat of the court, and continuing through Saturday, February 15, if necessary. Consideration will be limited to plans timely filed on or before February 11, 1992, in accordance with Order of January 30, 1992.

The initial portion of the hearing will involve the presentation of such plans by those parties who wish to support or join in the support of such plans, the reception of stipulations as to all pertinent census data and geographical configurations, and the indication of any other evidence proposed in the form of exhibits or by way of witnesses.

Particularly important is specifics as to deviation per district from the ideal of population parity, as well as maximum deviation per plan.

Thus, the initial portion of the hearing will in essence amount to an expedited pre-trial session, to be followed immediately by such further making of a record as is necessary.

As the order indicates, the presentation of supporting data should be, not just in the form of the prose of a proposed bill, but preferably in graphic format consisting of one or more maps to show proposed district boundaries in relation to census data and political subdivision boundaries. Recognizing that the preparation of such material may take time, it is understood that it may not be available at the outset, but should be submitted as promptly as possible.

The goal is to present the subject matter and make the necessary record during that period, so that during the work week of February 18-22, (1) counsel will have an opportunity to prepare and file memoranda in support of their positions, not later than the close of business Thursday, February 20, which will (2) enable this court to arrive at findings and a decision or — if the Supreme Court has taken jurisdiction and remanded the matter to this court for hearing — a proposed decision, at the earliest possible time in the week of February 24, 1992.

In view of the foregoing timetable in this Court, and recognizing the possibility of expedited further proceedings in the Supreme Court, we will look to the original respondent Secretary of the Commonwealth for a proposed revision of the election calendar, to be incorporated by the courts in a final order.

/s/ David W. Craig
DAVID W. CRAIG, President Judge

IN THE COMMONWEALTH OF PENNSYLVANIA

ROBERT J. MELLOW, Senator, 22nd District et al., Plaintiffs	:	
v.	:	No. 25 M.D. 1992
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth et al., Defendants	:	

ORDER

NOW, February 12, 1992, hearing of this matter is hereby scheduled to commence at 10:00 a.m., Thursday, February 13, 1992, at Courtroom No. 2 of this court, Fifth Floor, South Office Building, Harrisburg, PA. The parties plaintiff, including parties allowed to intervene as such, shall be prepared to:

1. Support, or join in the support of, proposed 21-district plans, timely filed on or before February 11, 1992, in accordance with Order dated January 30, 1992;

2. Stipulate as to: (1) census data, including population count and such other census information as may be pertinent, and (2) such boundaries of political subdivisions of the Commonwealth as may be pertinent;

3. Provide as to each plan supported specifics as to deviation of each proposed district from population parity, and as to maximum population deviation of the plan;

4. Display, as soon as is possible, the above plans and census data in the form of one or more maps and, if desired, other graphic format, not just in bill form; and

5. Report to the court the identity of any proposed supporting witnesses, the nature of any other evidence proposed and the estimated time required for the reception of such evidence.

After accomplishment of the foregoing, the court will proceed immediately to receive evidence on an expedited basis, continuing on Thursday and Friday, and through the business hours of Saturday, February 15, 1992, if necessary.

/s/ David W. Craig
DAVID W. CRAIG, President Judge

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ROBERT J. MELLOW, SENATOR, 22ND DISTRICT ET AL.	:	
Petitioners,	:	No. 7 M.D. Misc. Dkt.1992
v.	:	[No. 25 M.D. 1992]
BRENDA K. MITCHELL, ACTING SECRETARY OF THE COMMONWEALTH ET AL.	:	

ORDER

PER CURIAM:

AND NOW, this 13th day of February, 1992, the request for the assumption of plenary jurisdiction is granted. Since the matter is presently proceeding in the Commonwealth Court, The Honorable David W. Craig, President Judge of the Commonwealth Court, is hereby designated as a Master for this Court for the purpose of expedited proceedings and hearing, including rulings upon any ancillary petitions, applications and motions filed. Said Master shall report to this Court not later than February 26, 1992, as to its findings, recommended decision and a form or order for a revised election schedule.

Jurisdiction retained.
Mr. Justice Larsen did not participate in this matter.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

ROBERT J. MELLOW, SENATOR, 22ND DISTRICT ET AL.,	:	
Petitioners	:	No. 7 M.D. Misc. Docket 1992
v.	:	
BRENDA K. MITCHELL, ACTING SECRETARY OF THE COMMONWEALTH ET AL.,	:	

ORDER

PER CURIAM

AND NOW, this 3rd day of March, 1992, it is hereby ordered that argument on the exceptions filed in the above-captioned matter will be held on Saturday, March 7, 1992, at 10:30 a.m. in the courtroom of the Supreme Court in Pittsburgh, Pennsylvania.

Mr. Justice Larsen did not participate in the consideration or decision of this Order.

CONSTITUTIONAL AND STATORY PROVISIONS

United States Constitution Provisions

Article I, section 2, clause 3:

> Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse [sic] three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Article I, section 4, clause 1,:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or

alter such Regulations, except as to the Places of chusing Senators.

Fourteenth Amendment:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

. . .

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Fifteenth Amendment:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Pennsylvania Constitution Provision

Article II, section 16:

The Commonwealth shall be divided into fifty senatorial and two hundred three representative districts, which shall be composed of compact and contiguous territory as nearly equal in population as practicable. Each senatorial district shall elect one Senator, and each representative district one Representative. Unless absolutely necessary no county, city, incorporated town, borough, township or ward shall be divided in forming either a senatorial or representative district.

Article II, section 17:

(a) In each year following that in which the Federal decennial census is officially reported as required by Federal law, a Legislative Reapportionment Commission shall be constituted for the purpose of reapportioning the

Commonwealth. The commission shall act by a majority of its entire membership.

(b) The commission shall consist of five members: four of whom shall be the majority and minority leaders of both the Senate and the House of Representatives, or deputies appointed by each of them, and a chairman selected as hereinafter provided. No later than the fourth Monday in January of the year following the year in which the Federal decennial census if officially reported as required by Federal law, the four members shall be certified by the President Pro Tempore of the Senate and the Speaker of the House of Representatives to the elections officer of the Commonwealth who under law shall have supervision over elections.

The four members within forty-five days after their certification shall select the fifth member, who shall serve as chairman of the commission, and shall immediately certify his name to such elections officer. The chairman shall be a citizen of the Commonwealth other than a local, State or Federal official holding an office to which compensation is attached.

If the four members fail to select the fifth member within the time prescribed, a majority of the entire membership of the Supreme Court within thirty days thereafter shall appoint the chairman as aforesaid and certify his appointment to such elections officer.

Any vacancy in the commission shall be filled within fifteen days in the same manner in which such position was originally filled.

(c) No later than ninety days after either the commission has been duly certified or the population data for the Commonwealth as determined by the Federal decennial census are available, whichever is later in time, the commission shall file a preliminary reapportionment plan with such elections officer.

The commission shall have thirty days after filing the preliminary plan to make corrections in the plan.

Any person aggrieved by the preliminary plan shall have the same thirty-day period to file exceptions with the commission in which case the commission shall have thirty days after the date the exceptions were filed to prepare and file with such elections officer a revised reapportionment plan. If no exceptions are filed within thirty days, or if filed and acted upon, the commission's plan shall be final and have the force of law.

(d) Any aggrieved person may file an appeal from the final plan directly to the Supreme Court within thirty days after the filing thereof. If the appellant establishes that the final plan is contrary to law, the Supreme Court shall issue an order remanding the plan to the commission and directing the commission to reapportion the Commonwealth in a manner not inconsistent with such order.

(e) When the Supreme Court has finally decided an appeal or when the last day for filing an appeal has passed with no appeal taken, the reapportionment plan shall have the force of law and the districts therein provided shall be used

thereafter in elections to the General Assembly until the next reapportionment as required under this section seventeen.

(f) The General Assembly shall appropriate sufficient funds for the compensation and expenses of members and staff appointed by the commission, and other necessary expenses. The members of the commission shall be entitled to such compensation for their services as the General Assembly from time to time shall determine, but no part thereof shall be paid until a preliminary plan is filed. If a preliminary plan is filed but the commission fails to file a revised or final plan within the time prescribed, the commission members shall forfeit all right to compensation not paid.

(g) If a preliminary, revised or final reapportionment plan is not filed by the commission within the time prescribed by this section, unless the time be extended by the Supreme Court for cause shown, the Supreme Court shall immediately proceed on its own motion to reapportion the Commonwealth.

(h) Any reapportionment plan filed by the commission, or ordered or prepared by the Supreme Court upon the failure of the commission to act, shall be published by the elections officer once in at least one newspaper of general circulation in each senatorial and representative district. The publication shall contain a map of the Commonwealth showing the complete reapportionment of the General Assembly by districts, and a map showing the reapportionment districts in the area normally served by the

newspaper in which the publication is made. The publication shall also state the population of the senatorial and representative districts having the smallest and largest population and the percentage variation of such districts from the average population for senatorial and representative districts.

Article V, section 1:

The judicial power of the Commonwealth shall be vested in a unified judicial system consisting of the Supreme Court, the Superior Court, the Commonwealth Court, courts of common pleas, community courts, municipal and traffic courts in the City of Philadelphia, such other courts as may be provided by law and justices of the peace. All courts and justices of the peace and their jurisdiction shall be in this unified judicial system.

Article V, section 2:

The Supreme Court

(a) shall be the highest court of the Commonwealth and in this court shall be reposed the supreme judicial power of the Commonwealth;

(b) shall consist of seven justices, one of whom shall be the Chief Justice; and

(c) shall have such jurisdiction as shall be provided by law.

2 U.S.C. §2a:

> (a) On the first day, or within one week thereafter, of the first regular session of the Eighty-second Congress and of each fifth Congress thereafter, the President shall transmit to the Congress a statement showing the whole number of Representatives to which each State, excluding Indians not taxed, as ascertained under the seventeenth and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives by the method known as the method of equal proportions, no State to receive less than one Member.
>
> (b) Each State shall be entitled, in the Eighty-third Congress and in each Congress thereafter until the taking effect of a reapportionment under this section or subsequent statute, to the number of Representatives shown in the statement required by subsection (a) of this section, no State to receive less than one Member. It shall be the duty of the Clerk of the House of Representatives, within fifteen calendar days after the receipt of such statement, to send to the executive of each State a certificate of the number of Representatives to which such State is entitled under this section. In case of a vacancy in the office of Clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the Sergeant at Arms of the House of Representatives; and in case of vacancies in the offices of both the Clerk and the Sergeant at Arms, or the absence or inability of

both to act, such duty shall devolve upon the Doorkeeper of the House of Representatives.

(c) Until a State is redistricted in the manner provided by the law thereof after any apportionment, the Representatives to which such State is entitled under such apportionment shall be elected in the following manner: (1) If there is no change in the number of Representatives, they shall be elected from the districts then prescribed by the law of such State, and if any of them are elected from the State at large they shall continue to be so elected; (2) if there is an increase in the number of Representatives, such additional Representative or Representatives shall be elected from the State at large and the other Representatives from the districts then prescribed by the law of such State; (3) if there is a decrease in the number of Representatives but the number of districts in such State is equal to such decreased number of Representatives, they shall be elected from the districts then prescribed by the law of such State; (4) if there is a decrease in the number of Representatives but the number of districts in such State is less than such number of Representatives, the number of Representatives by which such number of districts is exceeded shall be elected from the State at large and other Representatives from the districts then prescribed by the law of such State; or (5) if there is a decrease in the number of Representatives and the number of districts in such State exceeds such decreased number of Representatives, they shall be elected from the State at large.

42 U.S.C. §1973:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Pennsylvania Statutory Provisions

25 P.S. §3571:

For the purpose of electing representatives of the people of Pennsylvania to serve in the House of Representatives in the Congress of the United States, this Commonwealth shall be divided into 23

districts which shall have one Congressman each, as follows:

The First District shall consist of Wards 1, 2, 5, 7, 13, 14, 15, 18, 19, 20, 25, 26, 27 and 30 (Divisions 4, 5, 10, 11, 12, 13, 14, 16, 17 and 18), 31, 36, 37, 39 and 42 (Divisions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23 and 24), 43, 47, 48 and 49 of the City of Philadelphia of Philadelphia County.

The Second District shall consist of Wards 3, 4, 6, 8 and 9 (Divisions 1, 2, 3, 14 and 15), 11, 12, 16, 17, 22, 24, 28, 29 and 30 (Divisions 1, 2, 3, 6, 7, 8, 9, 15, 19, 20 and 21), 32 and 34 (Divisions 1, 2, 3, 4, 5, 6, 7, 9, 10, 36, 38 and 43), 38 and 40 (Division 2), 44, 46, 50, 51, 52, 59 and 60 of the City of Philadelphia of Philadelphia County.

The Third District shall consist of Wards 10, 23, 33, 35, 41 and 42 (Division 25), 45, 53, 54, 55, 56, 57, 58, 61, 62, 63, 64, 65 and 66 of the City of Philadelphia of Philadelphia County.

The Fourth District shall consist of the Townships of Bethel, Burrell, Cadogan, East Franklin, Gilpin, Kittanning, Madison, North Buffalo, Parks, Plumcreek, South Bend, South Buffalo, Sugarcreek, Washington and West Franklin, and the Boroughs of Applewold, Elderton, Freeport, Kittanning, Leechburg, West Kittanning and Worthington of Armstrong County; the City of Beaver Falls, the Townships of Brighton, Chippewa, Darlington, Daughtery, Franklin, Greene, Harmony, Marion, New Sewickley, North Sewickley, Patterson, Pulaski, South Beaver, Vanport and White, and the

Boroughs of Aliquippa, Baden, Beaver, Big Beaver, Bridgewater, Conway, Darlington, Eastvale, Economy, Ellwood City (Beaver County Portion), Fallston, Georgetown, Glasgow, Homewood, Hookstown, Koppel, New Brighton, New Galilee, Ohioville, Patterson Heights and West Mayfield of Beaver County; Butler County; Indiana County; the City of New Castle, the Townships of Little Beaver, Mahoning, North Beaver, Perry, Plain Grove, Pulaski, Shenango, Taylor, Union, Wayne and Wilmington, and the Boroughs of Bessemer, Ellport, Ellwood City (Lawrence County Portion), Enon Valley, New Beaver, Snpj, South New Castle, Volent and Wampum of Lawrence County; and the Townships of Fairfield, Ligonier, and the Boroughs of Bolivar and Ligonier of Westmoreland County.

The Fifth District shall consist of the City of Coatesville, the Townships of Birmingham, Caln, Charlestown, East Bradford, East Brandywine, East Caln, East Fallowfield, East Goshen, East Marlborough, East Pikeland, East Whiteland, Easttown, Franklin, Kennett, London Britain, London Grove, New Garden, Newlin, Pennsbury, Pocopson, Schuylkill, Thornbury, Tredyffrin, Uwchlan, Valley, West Bradford, West Brandywine, West Goshen, West Marlborough, West Pikeland, West Whiteland, Westtown and Willistown, and the Boroughs of Avondale, Downingtown, Kennett Square, Malvern, Modena, Phoenixville, South Coatesville, West Chester, and West Grove of Chester County; the City of Chester, the Townships of Bethel, Birmingham, Chester, Concord, Lower Chichester, Thornbury and Upper Chichester, and the Boroughs of Marcus Hook and Trainer of Delaware County; the

Townships of Douglass, East Norriton, Franconia, Hatfield, Limerick, Lower Frederick, Lower Pottsgrove, Lower Providence, Marlborough, New Hanover, Perkiomen, Salford, Skippack, Upper Frederick, Upper Hanover, Upper Pottsgrove, Upper Providence; Upper Salford, West Norriton and West Pottsgrove, and the Boroughs of Collegeville, East Greenville, Green Lane, Hatfield, Pennsburg, Pottstown, Red Hill, Royersford, Schwenksville, Souderton, Telford (Montgomery County Portion) and Trappe of Montgomery County.

The Sixth District shall consist of Berks County; the Townships of Banks and Packer, and the Boroughs of Beaver Meadows, Lansford, Nesquehoning and Summit Hill of Carbon County, the Townships of Caernarvon, East Earl, Brecknock, East Cocalico, and West Cocalico, and the Boroughs of Adamstown, Denver and Terre Hill of Lancaster County; and Schuylkill County.

The Seventh District shall consist of the Townships of Aston, Darby, Edgemont, Haverford, Marple, Middletown, Nether, Newtown, Providence, Radnor, Ridley, Springfield, Tinicum, Upper Darby and Upper Providence, and the Boroughs of Aldan, Brookhaven, Chester Heights, Clifton Heights, Collingdale, Colwyn, Darby, East Lansdowne, Eddystone, Folcroft, Glenolden, Lansdowne, Media, Millbourne, Morton, Norwood, Parkside, Prospect Park, Ridley Park, Rose Valley, Rutledge, Sharon Hill, Swarthmore, Upland and Yeadon of Delaware County; Ward 40 (Divisions 1, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43,

44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55 and 56) of the City of Philadelphia of Philadelphia County.

The Eighth District shall consist of Bucks County; the Townships of Lower Moreland and Districts 1, 2 (Division 1), 3, 4, 5, 6 and 7 of Upper Moreland, and the Borough of Bryn Athyn of Montgomery County.

The Ninth District shall consist of Bedford County, Blair County, the Townships of Chest, Clearfield, Dean, Elder, Reade, Susquehanna and White, and the Boroughs of Hastings and Patton of Cambria County; the Townships of Beccaria, Bell, Bigler, Bloom, Boggs, Brady, Burnside, Chest, Cooper, Decatur, Ferguson, Greenwood, Gulich, Jordan, Knox, Morris, Penn, Pike and Woodward, and the Boroughs of Brisbin, Burnside, Chester Hill, Coalport, Curwensville, Glenhope, Grampian, Houtzdale, Irvona, Lumber City, Mahaffey, New Washington, Newburg, Osceola, Ramey, Troutville, Wallaceton and Westover of Clearfield County; the Townships of Cooke, Dickinson, Hopewell, Lower Frankford, Lower Mifflin, Monroe, North Newton, Penn, Shippensburg, South Middleton, South Newton, Southampton, Upper Frankford and Upper Mifflin, and the Boroughs of Mt. Holly Springs, Newburg, Newville and Shippensburg (Cumberland County Portion) of Cumberland County; Franklin County; Fulton County; Huntingdon County; Juniata County; and Mifflin County.

The Tenth District shall consist of Bradford County; the Townships of Chapman, Colebrook, Gallagher, Grugan, Leidy, Noyes and Woodward, and the Boroughs of Renova and South Renova of

Clinton County; Lackawanna County; the Townships of Jackson, Middle Smithfield, Paradise, Pocono, Price, Smithfield and Stroud, and the Boroughs of Delaware Water Gap, East Stroudsburg and Stroudsburg of Monroe County; Pike County; Potter County; Susquehanna County; Tioga County; Wayne County; and Wyoming County.

The Eleventh District shall consist of the Townships of East Penn, Franklin, Kidder, Lausanne, Lehigh, Lower Towamensing, Mahoning, Penn Forest and Towamensing, and the Boroughs of Bowmanstown, East Side, Jim Thorpe, Lehighton, Palmerton, Parryville, Weatherly and Weissport of Carbon County, Columbia County; Luzerne County; the Townships of Barrett, Coolbaugh and Tobyhanna; and the Borough of Mt. Pocono of Monroe County, Montour County; the City of Shamokin, the Townships of Coal, East Cameron and Mt. Carmel, and the Boroughs of Kulpmont, Marion Heights and Mt. Carmel of Northumberland County; and Sullivan County.

The Twelfth District shall consist of the Township of Kiskiminetas, and the Boroughs of Apollo and North Apollo of Armstrong County; the City of Johnstown, the Townships of Adams, Allegheny, Barr, Blacklick, Cambria, Conemaugh, Cresson, Croyle, East Carroll, East Taylor, Gallitzin, Jackson, Lower Yoder, Middle Taylor, Munster, Portage, Richland, Stonycreek, Summerhill, Upper Yoder, Washington, West Carroll, and West Taylor, and the Boroughs of Ashville, Barnesboro, Brownstown, Carrolltown, Cassandra, Chest Springs, Cresson, Daisytown,

Dale, East Conemaugh, Ebensburg, Ehrenfeld, Ferndale, Franklin, Gallitzin, Geistown, Lilly, Lorain, Loretto, Nanty Glo, Portage, Sankertown, Scalp Level, South Fork, Southmont, Spangler, Summerhill, Tunnelhill (Cambria County Portion), Vintondale, Westmont and Wilmore of Cambria County; Somerset County; the Cities of Greensburg and Jeannette, the Townships of Bell, Cook, Derry, Donegal, Hempfield, Loyalhanna, Mt. Pleasant, North Huntingdon, Penn, Salem, St. Clair, Unity and Washington and the Boroughs of Adamsburg, Arona, Avonmore, Delmont, Derby, Donegal, Export, Hunker, Irwin, Latrobe, Madison, Manor, Murrysville, New Alexandria, New Florence, New Stanton, North Irwin, Penn, Seward, South Greensburg, Southwest Greensburg, Youngstown and Youngwood of Westmoreland County.

The Thirteenth District shall consist of the Townships of Abington, Cheltenham, Horsham, Lower Gwynedd, Lower Merion, Lower Salford, Montgomery, Plymouth, Springfield, Towamencin, Upper Dublin, Upper Gwynedd, Upper Merion, District 2 (~~Division~~ 2) of Upper Moreland, Whitemarsh, Whitpain and Worcester, and the Boroughs of Ambler, Bridgeport, Conshohocken, Hatboro, Jenkintown, Lansdale, Narberth, Norristown, North Wales, Rockledge and West Conshohocken of Montgomery County; Wards 9 (Divisions 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16 and 17), 21 and 34 (Divisions 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 39, 40, 41 and 42) of the City of Philadelphia of Philadelphia County.

The Fourteenth District shall consist of the City of Pittsburgh, the Townships of Baldwin, Kennedy, Neville, Reserve and Stowe, and the Boroughs of Castle Shannon, Coraopolis, Ingram, McKees Rocks, Millvale, Mt. Oliver, Sharpsburg and Wilkinsburg of Allegheny County.

The Fifteenth District shall consist of Lehigh County; Northampton County; and the Townships of Chestnut Hill, Eldred, Hamilton, Polk, Ross and Tunkhannock of Monroe County.

The Sixteenth District shall consist of the Townships of East Nottingham, East Coventry, East Nantmeal, East Vincent, Elk, Highland, Honeybrook, Londonderry, Lower Oxford, New London, North Coventry, Penn, Sadsbury, South Coventry, Upper Oxford, Upper Owchlan, Wallace, Warwick, West Caln, West Fallowfield, West Nantmeal, West Nottingham, West Sadsbury and West Vincent, and the Boroughs of Atglen, Elverson, Honey Brook, Oxford, Parkersburg and Spring City of Chester County; the City of Lancaster, the Townships of Bart, Clay, Colerain, Conestoga, Conoy, Drumore, Earl, East Donegal, East Drumore, East Hampfield, East Lampeter, Eden, Elizabeth, Ephrata, Fulton, Lancaster, Leacock, Little Britain, Manheim, Manor, Martic, Mt. Joy, Paradise, Penn, Pequea, Providence, Rapho, Sadsbury, Salisbury, Strasburg, Upper Leacock, Warwick, West Donegal, West Earl, West Hempfield and West Lampeter, and the Boroughs of Akron, Christiana, Columbia, East Petersburg, Elizabethtown, Ephrata, Lititz, Manheim, Marietta, Millersville, Mountville, Mt. Joy, New Holland, Quarryville and Strasburg of Lancaster County; and Lebanon County.

The Seventeenth District shall consist of Dauphin County; Lycoming County; the City of Sunbury, the Townships of Delaware, East Chillisquaque, Jackson, Jordan, Lewis, Little Mahanoy, Lower Augusta, Lower Mahanory, Point, Ralpho, Rockefeller, Rush, Shamokin, Turbot, Upper Augusta, Upper Mahanory, Washington, West Cameron, West Chillisquaque and Zerbe, and the Boroughs of Herndon, McEwensville, Milton, Northumberland, Riverside, Snydertown, Turbotville and Watsontown of Northumberland County; Perry County; Snyder County; and Union County.

The Eighteenth District shall consist of the Townships of Aleppo, Crescent, Findlay, Hampton, Kilbuck, Leet, Marshall, McCandless, Moon, Mt. Lebanon, North Fayette, O'Hara, Ohio, Penn Hills, Pine, Richland, Robinson, Ross, Scott, Shaler, South Park and Upper St. Clair, and the Boroughs of Aspinwall, Avalon, Bell Acres, Bellevue, Ben Avon, Ben Avon Heights, Bethel Park, Blawnox, Braddock Hills, Bradford Woods, Carnegie, Churchill, Crafton, Dormont, Edgewood, Edgeworth, Emsworth, Etna, Forest Hills, Fox Chapel, Franklin Park, Glenfield, Green Tree, Haysville, Jefferson, Osborne, Pennsbury Village, Pleasant Hills, Rosslyn Farms, Sewickley, Sewickley Heights, Sewickley Hills, Thornburg, West Elizabeth, West View and Whitehall of Allegheny County.

The Nineteenth District shall consist of Adams County; the Townships of East Pennsboro, Hampden, Lower Allen, Middlesex, North Middleton, Silver Spring, Upper Allen and West Pennsboro, and the Boroughs of Camp Hill,

Carlisle, Lemoyne, Mechanicsburg, New Cumberland, Shiremanstown, West Fairview and Wormleysburg of Cumberland County; and York County.

The Twentieth District shall consist of the Cities of Clairton, Duquesne and McKeesport, the Townships of East Deer, Elizabeth, Fawn, Forward, Frazer, Harmar, Harrison, Indiana, North Versailles, South Versailles, Springdale, West Deer and Wilkins, and the Boroughs of Baldwin, Brackenridge, Braddock, Brentwood, Chalfant, Cheswick, Dravosburg, East McKeesport, East Pittsburgh, Elizabeth, Glassport, Homestead, Liberty, Lincoln, Monroeville, Munhall, North Braddock, Oakmont, Pitcairn, Plum, Port Vue, Rankin, Springdale, Swissvale, Tarentum, Trafford (Allegheny County Portion), Turtle Creek, Verona, Versailles, Wall, West Homestead, West Mifflin, Whitaker, White Oak and Wilmerding of Allegheny County; the Cities of Arnold, Lower Burrell, Monessen and New Kensington, the Townships of Allegheny, East Huntingdon, Rostraver, Sewickley, South Huntingdon and Upper Burrell, and the Boroughs of East Vandergrift, Hyde Park, Mt. Pleasant, North Belle Vernon, Oklahoma, Scottdale, Smithton, Sutersville, Trafford (Westmoreland County Portion), Vandergrift, West Leechburg and West Newton of Westmoreland County.

The Twenty-first District shall consist of Crawford County; Erie County; the Townships of Hickory, Neshannock, Scott, Slippery Rock and Washington, and the Borough of New Wilmington of Lawrence County; and Mercer County.

The Twenty-second District shall consist of the Townships of Collier and South Fayette, and the Boroughs of Bridgeville, Heidelberg, Leetsdale, McDonald (Allegheny County Portion) and Oakdale of Allegheny County; the Townships of Center, Hanover, Hopewell, Independence, Potter, Raccoon and Rochester, and the Boroughs of Ambridge, East Rochester, Frankfort Springs, Freedom, Industry, Midland, Monaca, Rochester, Shippingport and South Heights of Beaver County; Fayette County; Greene County; and Washington County.

The Twenty-third District shall consist of the Townships of Boggs, Bradys Bend, Cowanshannock, Hovey, Mahoning, Manor, Perry, Pine, Rayburn, Redbank, Valley and Wayne, and the Boroughs of Atwood, Dayton, Ford City, Ford Cliff, Manorville, Parker City, Rural Valley and South Bethlehem of Armstrong County; Cameron County; Centre County; Clarion County; the City of Dubois, the Townships of Bradford, Covington, Girard, Goshen, Graham, Huston, Karthaus, Lawrence, Pine, Sandy and Union, and the Boroughs of Clearfield and Falls Creek (Clearfield County Portion) of Clearfield County; the City of Lock Haven, the Townships of Allison, Bald Eagle, Beech Creek, Castanea, Crawford, Dunnstable, East Keating, Greene, Lamar, Logan, Pine Creek, Porter, Wayne and West Keating, and the Boroughs of Avis, Beech Creek, Flemington, Loganton and Mill Hall of Clinton County; Elk County; Forest County; Jefferson County; McKean County; Warren County; and Venango County.

TRANSCRIPT MATERIALS

Transcript of Master's Hearing, Vol. I at 17-19:

THE COURT: . . . Have I missed any statewide plan in getting this introduction?

MR. KRILL: Yes, Your Honor. John Krill for Senator Loeper and his co-intervenors.

Your Honor, we did file a plan that was the plan passed by the State Senate. We have brought with us this morning a corrected plan and map that we would like to offer to the Court for its consideration.

THE COURT: It's late. In fact, you didn't have any plan in by the 11th, did you?

MR. MacNETT: We had a plan. We did not submit the maps that —

THE COURT: That's why counsel is filing it.

MR. MacNETT: There was a legal description filed with the Court with our intervention.

THE COURT: Before the 11th?

MR. MacNETT: Yes, on the 11th.

MR. KRILL: But not a map, Your Honor.

THE COURT: Okay. Frankly, this would be the only exception I would make. Again, recognizing that there is a party or partisan aspect of this, I just want to make sure all viewpoints are represented.

What is the maximum on that plan?

MR. MOORE: Your Honor, for clarification, are they giving us numbers on the plan they submitted, complying with the Court's order, or are they giving us the number on the new plan they are now attempting to submit?

MR. MacNETT: The numbers I would propose to offer the Court would be on the plan amendment that we —

MR. MOORE: The plan they are attempting to submit after the deadline.

MR. MacNETT: That's correct.

THE COURT: Is this a correction of the plan that you submitted on the 11th, or is it a new plan?

MR. MacNETT: It is essentially the plan that we filed on the 11th, with some very minor fine tuning.

THE COURT: I'm being very liberal on this. Go ahead.

MR. MOORE: Just for the record, we would object.

THE COURT: I will overrule that objection.

Transcript of Master's Hearing, Vol. I at 34-37.

Q Mr. McKillop, could you tell the Court what your position is?

A I'm an administrative officer for the Senate Democratic Leader, which is Senator Mellow.

Q Do you have any other positions in state government, sir?

A Yes, I was the supervisor of the Senate Democratic Reapportionment Project during the Senate and House reapportionment.

Q Could you describe your responsibilities as the supervisor of the Senate Democratic Reapportionment Project for the Court, please?

A Yes. I supervised a staff of four on the technical aspects of our reapportionment project.

Q When you say the technical aspects of the reapportionment project, can you identify what those are, please?

A The actual drawing of the lines and dealing with the data needed to draw those lines.

Q How long have you served in your position as supervisor of the Senate Democratic Reapportionment Project?

A I started working on the project part-time, starting in the mid 1980s, about 1985, and full-time as of 1989.

Q Mr. McKillop, have you had any other employment relating to politics or elections or campaigning?

A On five occasions I left the employ of the Commonwealth and the State Senate and worked for the Democratic Senate State Campaign Committee, doing electoral research, polling, things of that nature.

Q Over what time period are we talking about here?

A Starting 1980 to 1986.

Q During those five occasions —

THE COURT: Excuse me, I consider this witness qualified as an expert in this area, if that's what you want. Go ahead.

MR. PACKMAN: Thank you, Your Honor.

MR. KRILL: Your Honor, excuse me.

THE COURT: Do you want a voir dire?

MR. KRILL: At this point, Your Honor, I think if the witness is going to be qualified as an expert as opposed to a fact witness, I would like an offer from counsel.

MR. PACKMAN: Your Honor, given the nature of these proceedings, we would submit Mr. McKillop is both a fact witness in the sense he's been responsible for the drawing and supervising of the drawing of the plans before the Court. He is also an expert witness to the extent he's had extensive experience in redistricting and political campaigning, polling, that sort of thing.

THE COURT: Isn't this used most primarily as a fact witness? Given the objective fact bases for each plan, the subjective evaluation of the plan is on the Court's shoulders. Isn't that fair?

MR. PACKMAN: All right, then, Your Honor. Your Honor, maybe we are debating an abstract issue. I don't intend to ask Mr. McKillop his opinions about whether the plan is fair, just or appropriate.

THE COURT: What, for example, would you ask his opinions by? I think that's what Mr. Krill wants as an offer.

MR. PACKMAN: Mr. McKillop will be testifying about the racial makeup of the congressional districts we proposed in the Philadelphia area.

THE COURT: That is not a matter of opinion, is it?

MR. PACKMAN: I don't believe so. I'm just identifying the subject matter for the Court to see if we have a potential problem. He will be talking about election results, the results of various elections that have occurred in that proposed congressional district.

THE COURT: Who won, who lost, by how much?

MR. PACKMAN: Right, that sort of thing.

THE COURT: That's not an opinion. Unless he wants to tell us whether it was a good candidate or bad candidate.

MR. PACKMAN: I don't believe so, Your Honor.

THE COURT: I'm not sure there would be much of a range for opinion. Go ahead and let's see.

BY MR. PACKMAN:

Q Mr. McKillop, as a result of your experience in redistricting and campaigning —

MR. KRILL: Your Honor, given your ruling, I would object to his qualification as an expert. I understand there may be specific questions that would be objectionable and others not.

THE COURT: I will overrule your objection.

Transcript of Master's Hearing, Vol. I at 70-72.

THE COURT: Again, I don't think it's necessary to repeat the figures.

Let me ask with respect to these illustrations, do I gather correctly that these hypothetically indicate new congressional districts?

MR. PACKMAN: 1 and 2.

THE COURT: 1 and 2 under Plans 2 and 3 have an increased black voter percentage, but new Congressional District No. 3 being all in Philadelphia would have a reduced African-American voter percentage?

A I do believe it's reduced but slightly.

THE COURT: Let's take '87. White Republican Rizzo would do much better in new Congressional District No. 3, is that right?

A That is correct.

THE COURT: And African-American and Democrat Goode would do much less?

A That's correct.

THE COURT: Why is that?

A Because both Congressional District 1 and 2 are effective majority-minority districts.

THE COURT: And 3 is not?

A And 3 is not.

THE COURT: Thank you.

BY MR. PACKMAN:

Q When you say effective majority-minority districts, what do you mean?

A It allows the majority-minority, in this case, African-American voters —

MR. MOORE: Objection.

A — the opportunity —

MR. HARVEY: Now we are getting into opinion.

MR. MOORE: I'm not sure what he's talking about when he refers to majority-minority.

THE COURT: He's just defining his term. I overrule the objection because he's defining the term that he's using.

MR. HARVEY: I withdraw the objection. I think Your Honor is correct.

BY MR. PACKMAN:

Q Can you tell the Court what you mean by majority-minority district?

A A majority-minority district where the minority, in this case African-American, is majority in that district.

Q What do you mean by an effective majority-minority district?

A One where that majority-minority, in this case African-American, have an opportunity to select the candidate of their choice.

Transcript of Master's Hearing, Vol. 2A at 8-9:

MR. MOORE: Your Honor, you made a decision yesterday Mr. Murphy would not be able to submit a plan because they did not timely file. They were allowed to intervene, but they are not allowed to submit a plan. Are you now reversing your decision?

THE COURT: Did I say that?

MR. MOORE: Yes.

THE COURT: I did not say that at all.

MR. MOORE: Then they are not going to be allowed to submit a plan?

THE COURT: Obviously I'm considering, because I think it's important to have every possible plan, every official plan in this ballpark. If I vacated that order and allowed them, it would be because of an extreme-felt need. I'm totally justified in keeping it out because it was tardily filed. As I say, I'm trying to balance here considerations of completeness.

I think it's fair to say, and I sort of think out loud, as I'm accustomed to do in appellate arguments, ideally or preferably or perhaps even feasibly, this Court should make its decision, rest its decision on one entire plan or the other. To fit together two plans appears, to my untutored mind, to be the same as trying to take part of the jigsaw puzzle pieces from one jigsaw and replace it with pieces from a totally different puzzle, cut on a different configuration. At present I don't think it's warranted, but I just wanted you to know what our maximum time exposure was.

Transcript of Master's Hearing, Vol 2B at 132-33:

MR. MURPHY: Your Honor, this morning you seemed to be contemplating reconsidering whether Representative Ryan could present his plan.

THE COURT: We will leave that up to the Federal Court.

Transcript of Master's Hearing, Vol. 2B at 129-30:

MR. PACKMAN: One final housekeeping matter, so I can call witnesses tonight, contact them over the telephone I mean.

If I can have some notion whether or not we will be allowed to call rebuttal witnesses. If I can have some notions whether or not I'd be allowed to call one rebuttal witness to testify very briefly, I'd very much appreciate it.

THE COURT: It's hard for me to predict. I'm going to have to control it so by this time tomorrow we are finished making a record.

I appreciate and am familiar with, as a litigator myself for many years, Counsel's desire to protect the record and to maximize opportunities. We have gotten a lot of useful information in here, and I think that every plan that has been presented — I wish we had what I would call the Ryan plan here, I wish we had another — there is another party that I authorized the intervention of today, the Fredrick Douglas Association from Philadelphia, represented by Mr. Jones. However, they did not request intervention until yesterday, the 13th, and of course had not submitted a plan. I have, where possible, construed the deadline of the 11th as broadly as possible and said that persons who missed that can nevertheless participate, and it was pretty well publicized.

I'm pointing for a goal by this time tomorrow we will be writing briefs or ready to write briefs.

Transcript of Master's Hearing, Vol. 3 at 137-44:

MR. KRILL: Your Honor, I guess at this point I would like to continue with moving exhibits into evidence . . . . Exhibit 16, which is the map Your Honor requested, the original Loeper map.

. . . .

THE COURT: I assume there's no objection to that. That's admitted.

(Loeper Exhibit No. 16 was admitted into evidence.)

MR. KRILL: Back to Exhibit 2, the aqua-covered book, which is the amended Loeper plan data.

THE COURT: With respect to 2, the amended plan; 3 and 4, the metropolitan areas and the amended plan; 5, that statewide map —

MR. KRILL: Also 11, which is the legal description for the amended plan.

THE COURT: And 13 and 14, which are registration and minority details on that, right?

MR. KRILL: That is correct, Your Honor.

THE COURT: Those are admitted solely for the purpose of —

MR. MOORE: I would like to reinstate my objection to the admission of each of those documents. The testimony we have

heard indicates there have been total population shifts between the first plan and second plan somewhere in excess of 327,000 people just in the districts we were able to quickly identify. A review of each of the population totals for the districts in that plan shows in every single district there are net population changes. Some districts they are as high as 300 people, one district it's as high as 400, and many of the districts it's in the hundreds. This is a different plan.

We have been told that the first plan was prepared in an effort to get some bipartisan support. In spite of the proponent's technical witness on this point, it is clear this plan would constitute a major shift in the political delegation. Currently there is a one vote republican edge in a 23-member delegation. We are going to lose two seats, we are going to a smaller delegation.

THE COURT: Are you now talking about Loeper 1 or Loeper amended? Original Loeper or amended Loeper?

MR. MOORE: The one vote edge is a current situation, it's our current delegation with 23 members. We are going down to 21, we are losing two, which is bad enough. Under the amended Loeper version, it is a likely possibility that there will be a three vote republican edge. That in itself is a significant change. On top of that is the fact that the delegation will change from 23 members to 21. That makes the impact of that three vote edge that much more significant. It cannot be argued that these are the same plans. This is a different plan.

THE COURT: I agree.

MR. MOORE: This is a second plan. But on top of that, it is a second plan which was not timely submitted.

THE COURT: I agree.

MR. MOORE: You are agreeing with me. I am on the record against the admission of untimely submitted plans. And in opposition to each one of those amendments.

MR. KRILL: I don't think the record supports the inference there is a difference in political outcomes between the Loeper original plan and Loeper amended plan. The record will show what it shows with respect to population shifts.

Mr. D'Innocenzo testified what he did in preparing the amended Loeper plan was alter some allocations of wards, but he was doing that to try to keep to the same result in avoiding splitting of precincts. The original plan has only one split precinct, the amended plan has only one split precinct, and that with a zero population affected.

Obviously, in order to achieve those same results and yet tighten deviation, you have got to do more in order to avoid splitting precincts which was a testified objective of in fact I think many of the state parties. I don't think the Loeper plan supports the inferences Mr. Moore suggests.

THE COURT: There were more than inferences. There were substantial population exchanges. As you say, they tend to come out with a rather low bottom-line value. But there were substantial population exchanges.

MR. KRILL: That is correct. I don't believe that substantially changes political outcomes or even registration outcomes, if you take a close look at the data. I suggest again that's a matter for evidence and it's a matter for the Court's consideration in deciding which plan is the best plan.

We are supporting the Loeper amended plan. At the outset of the proceeding we were given permission by Your Honor to amend our plan, we did so, we proceeded on that basis. I believe

that the documents, as you have just ruled, should be admitted, and it should be for the Court to decide.

THE COURT: The Loeper parties have not withdrawn the original plan. It is still before us. I rule that the amended plan is not allowable for consideration as a plan.

I admit the exhibits for the sole purpose of showing the deficiencies in the Loeper original plan.

MR. KRILL: I think you misunderstood me. I said the Loeper amended plan was the plan we stand behind.

THE COURT: You didn't withdraw Loeper Plan 1.

MR. KRILL: I didn't think it was necessary since you had ruled we should submit the amended plan, and the only data I had intended to provide the Court, until the Court asked for more, was the amended plan data.

THE COURT: You did not withdraw Loeper Plan 1.

MR. KRILL: If you will permit me to withdraw Loeper Plan 1 and substitute the amended plan, I will do so immediately.

THE COURT: I can't allow that for the reasons stated. The amended plan is a substantial difference. If it weren't a substantial difference, you wouldn't be pushing so hard to have the amended plan replace the original plan. If they were substantially the same, you'd be content to rest on the original plan, desirably amended by the departures. To be fair to the deadline, I have to say —

MR. KRILL: I think we have been prejudiced by the Court's initial ruling in this matter allowing us to file an amended plan.

. . . .

If there is any issue of voter registration -- well, we can produce a printout that will show Your Honor and show counsel that voter registrations are substantially the same in both plans. We wish to substitute the amended plan for the original plan, and I so move the Court.

THE COURT: If you do, you are going to have no plan before me. Let me point out:

As illustrated by the testimony this morning, the questions asked Mr. D'Innocenzo, by Mr. Moore particularly, simply amounted to having the witness agree to computations, and the witness, being a reasonable person, said if that's a correct computation, I have to agree. On the amended plan details, on the original plan details, all of the figures are in the record. If you want to support the original plan, which as you say is not very different, one would have to study the two maps closely to see the difference. It is time to turn to on the basis of the exhibits that are in the record, and every exhibit that's been offered has been admitted, with the sole exception of the detailing of an exhibit that relates to one attack. It's in the record. It's now time to turn to memoranda. And on that basis of those computations, give me the guts of it.

Obviously, the exhibits on the amended plan have to be in the record in order to show that — frankly, they can say it is to show the deficiencies in your original plan. You can say to show how close your original plan is to perfection. Use that as you wish.

MR. KRILL: Your Honor, may I suggest that if all consideration of the amended plan, as a plan for adoption by the Court, is precluded, I think that may, in fact, introduce true error of constitutional dimension into the Court's decision, for this reason: The record will show that the amended Loeper plan is the best plan in terms of enhancing minority rights and in terms of protecting minority rights.

Transcript of Master's Hearing, Vol. 3 at 209-22:

MR. PACKMAN: . . . I know the hour's late, but I would once again renew my request for rebuttal testimony, Your Honor?

THE COURT: Can we have an offer?

MR. PACKMAN: Your Honor, it would be expert testimony on the issue of whether a 69 percent or 68 percent African-American percentage is required in Congressional District 2. As the Court knows, it's our position a 62 percent African-American district, 62 percent African-American total population in Congressional District 2, would be more than sufficient to enable the African-American community in Congressional District 2 to elect a representative of its choice. I think that's reflected in part by Attorney Jones' profter to the Court, that her clients support the Plaintiffs' Proposed congressional plans as an alternative to the James plan.

I would also have to request Your Honor that it be done by telephone conference call, since my witness, unfortunately, has not been able to make it here.

THE COURT: I will now receive, but not encourage, any further offers with respect to rebuttal evidence.

. . . .

MR. HARVEY: . . . Concerning the rebuttal advance by Mr. Packman, I do agree that there is a major gap in his proofs, which I intend to address in my papers, and I don't wish to sandbag him by failing to note that. That is, I think there is a big gap. I think, however, it is also one which should prudently have been anticipated, since the whole thrust of his argument has been to create the two majority-minority districts. I believe he's been retained with that objective in mind, and to suggest he couldn't

prove it up during the three days that Your Honor set for hearing, it now being 4:20 . . . —

. . . .

In any event, I think there is a gap in Mr. Packman's case. I think it is unfair to the Court and counsel to propose that there be rebuttal at some point in the future, if that's what he's suggesting.

THE COURT: I will say that the attack on the reduction by some degree of District 1 in order to achieve a majority in District 2, at least by reaching in the direction of District 1, has been attacked in the —

MR. HARVEY: I think Your Honor reversed the two.

MR. PACKMAN: I think Your Honor reversed. The reduction of District 2 by bringing up District 1.

THE COURT: I beg your pardon. It has been attacked in the cases in chief.

Mr. Packman, would you specify your offer a little bit more. What would be the thrust and content, summarize the content of the proposed testimony.

MR. PACKMAN: We would proffer the testimony of Lisa Handley who is employed by Election Data Services in Washington D.C. Ms. Handley is an expert in this field, having done racial voting analysis for Election Data Services for some time. She's also teaching a course this year at George Washington University and holds a Ph.D. in political science.

Ms. Handley performed in certain statistically accepted techniques in the racial voting analysis area, such as homogenous precinct analysis and regression analysis, and she can explain to the Court what those are, or I can if the Court would prefer.

Ms. Handley analyzed a number of elections in Philadelphia during the 1980's and concluded on the basis of her analysis that an African-American total population percentage of 69 percent would not be required in the second congressional district in order to permit the African-American community the opportunity to elect a candidate of its choice. That indeed even a 62 percent percentage, the percentage in the Plaintiffs' Proposed Congressional Plans, would be more than adequate in order for an African-American candidate or the candidate of the African-American community's choice to win election in that district.

THE COURT: Would her testimony be required to be supported by additional exhibits not now on the record?

MR. PACKMAN: No, Your Honor.

. . . .

MR. HARVEY: If the proposition is that the black community can select, the African-American community can select its own representative, and Mr. Packman repeatedly referred in the singular to that, then that is one proposition which might be proven by some statistical analysis without regard to what's actually happened in real life, where I have challenged that and where I think it's inappropriate to be receiving statistical proofs which presume that there will be a single candidate from the African-American community, it has been made plain in the cross-examination. I think that's the gap which now exists in the record. Perhaps Mr. Packman intends to close that. But I think it's unfair and inconsistent with the way Your Honor desires to bring the proceedings to a close, that this issue which was anticipated from the very beginning should be one that keeps us still open and in session beyond 4:30 on Saturday.

MR. KRILL: I found something I can agree with Mr. Harvey on. I believe this is an issue that was squarely within the

scope of the Plaintiffs' complaint, it should have been part of their case in chief, and I oppose any further evidentiary hearing.

. . . .

THE COURT: The question will be whether there's any hard and fast principle — I guess principles by definition are never hard and fast. Whether there's any principle held before us by the United States Supreme Court whose own sophistication in this matter is growing, this nonretrogression principle.

On the other hand, it seems to me, in my newly growing understanding of this area, that when we speak of majority-minority area in which minority citizens have an opportunity to be represented with respect to the various concerns that are variously special to individuals among them, because I think it boils down to a realization, with which I think we will all agree, that the African-American citizens do not and are not envisioned by the Supreme Court to function in any monolithic fashion; that like all of our constituent groups in the United States, that there are a whole range of expressions that may be represented by a whole range of candidates.

I'm very interested in reading and reviewing this viewpoint by the Supreme Court. My present understanding is that it is not binding as a rule. The no-dilution rule does not always operate like a ratchet, that must always ratchet up.

MR. HARVEY: Absolutely not. There are many factors Your Honor must balance. But I think Your Honor will have to be addressing, among other things, the evidence which did come in from Mr. Packman for what it was worth, that with the deduction of Peter Hearn as a candidate in the democratic multi-candidate race, primary race for mayor, I believe I brought out, that if you assume that Peter Hearn were not a candidate and you assume that Rendell might have gotten his notes, you then had a situation in which the proposed second district under Mr.

Packman's plan would have been carried by a white candidate for that office. That's a fact.

THE COURT: I think we are getting far afield here.

. . . .

Let's deal with the matter at hand.

I really don't think much would be afforded. It is true this Court, being unique among the courts in the nation by the very fact you have an appellate court that frequently conducts original jurisdiction trials, we are familiar with the taking of evidence by telephone in various state agencies in which sworn evidence is taken by telephone. I at times have testified as a witness in those. So it's quite achievable.

But I think Mr. Harvey's position is well taken, that the receiving of this evidence is not only questionably appropriate but unnecessary. I'm going to decline to allow the rebuttal proposed by Mr. Packman.

PLAN COMPARISON BASED ON DATA IN THE RECORD BEFORE THE MASTER

	Plaintiff Proposed Plan 1	Plaintiff Proposed Plan 2	O'Donnell Plan A	O'Donnell Plan B	Murtha/ McDade Plan	Loeper Original	Loeper Amended
Average Deviation (%)	.03999	.0024	.002665	.0027	unknown[1]	.032445	.0005143
Maximum Range of Deviation (%)	.189292	.0111	.011488	.0083	unknown[1]	.13344	.00954
Municipalities Split (Includes Counties)	1 City 16 County	8 Cities 18 Counties	8 Local 23 County	8 Local 17 County	27 Local 21 Counties	10 Local[2] 22 County	23 Local[2] 22 County
Election Precincts Split	1 (involves no population)	3 (1 split involves no population)	0	0	30 (admitted in brief)	1 (involves no population)	1 (involves no population)
Balance of Districts, by Dominant Party Voter Registration	12 Democrat 9 Republican	13 Democrat 8 Republican	12 Democrat 9 Republican	13 Democrat 8 Republican	unknown[1] unknown[1]	11 Democrat 10 Republican	11 Democrat 10 Republican
Percentage in Proposed Congressional District 1							
(1) African-American Population	(1) 52.356	(1) 52.356	(1) 39.249	(1) 36.570	(1) 41.658	(1) 46.686	(1) 49.048
(2) African-American Voting Population	(2) 49.716	(2) 49.716	(2) 36.1375	(2) 33.6288	(2) 38.011	(2) 43.359	(2) 45.915
Percentage in Proposed Congressional District 2							
(1) African-American Population	(1) 62.242	(1) 62.242	(1) 67.733	(1) 68.762	(1) 69.585	(1) 68.055	(1) 65.857
(2) African-American Voting Population	(2) 58.353	(2) 58.353	(2) 64.3166	(2) 65.3072	(2) 66.617	(2) 64.738	(2) 62.447
Percentage in Proposed Congressional District 3							
(1) African-American Population	(1) 4.859	(1) 4.859	(1) 13.017	(1) 14.639	(1) 8.834	(1) 4.469	(1) 4.334
(2) African-American Voting Population	(2) 4.510	(2) 4.510	(2) 12.2326	(2) 13.70088	(2) 8.348	(2) 4.221	(2) 4.090

[1] The calculations for the Murtha/McDade Plan are unknown due to the nature of the data they utilized in creating the plan.

[2] Includes one with zero (0) population involved.

	Plaintiff Proposed Plan 1	Plaintiff Proposed Plan 2	O'Donnell Plan A	O'Donnell Plan B	Murtha/ McDade Plan	Loeper Original	Loeper Amended
Percentage in Proposed Congressional District 14 (1) African-American Population (2) African-American Voting Population	(1) 17.78	(1) 17.81	(1) 19.14	(1) 17.19	(1) 17.3	(1) 22.44	(1) 22.31
Effect on Current 6th District (Yatron, retiring)	Remains largely intact	Remains largely intact	Subsumed by 5th, 15th, 16th and 17th	Remains largely intact	Divided among bordering districts	Divided among bordering districts	Divided among bordering districts
Effect on Current 20th District (Gaydos, retiring)	Split among 3 districts: 20th, which has moved south, 18th and 4th	Split among 3 districts: 20th, which has moved south, 18th and 4th	Subsumed by 18th	Subsumed by 18th	Subsumed largely by 18th	Recreated as open seat dominated by Westmore-land County	Recreated as open seat dominated by Westmore-land County
Districts currently held by Republican being combined with other district	Combining 5th and 7th	Combining 5th and 7th	None	4 Incumbent Republicans Districts Combined: 23rd with 21st; and 5th with 7th	Instructed: "Absolutely, if possible, not to throw any current incumbents into a district where they were facing another incumbent." (Vol. 2-A at 12)	None	None
Districts currently held by Democrat being combined with other district	Just 20th (combine with new 20th, 18th and 14th)	Just 20th (combine with new 20th, 18th and 14th)	Not other than retiring Congressmen	Not other than retiring Congressmen	See above block for instructions regarding incumbents	Combines 4th with 22nd	Combines 4th with 22nd

IN THE SUPREME COURT OF PENNSYLVANIA
BEFORE THE HONORABLE DAVID W. CRAIG, MASTER

ROBERT J. MELLOW, et al.,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	No. 7 M.D. 1992
	:	
BRENDA K. MITCHELL, et al.,	:	
	:	
Defendants.	:	

ANSWER AND NEW MATTER OF INTERVENORS, LOEPER, ET AL.

NOW COME Intervenors, Loeper, et al., by their attorneys, and respond to Plaintiffs' Complaint as follows:

. . . .

NEW MATTER

20. Any redistricting plan, to meet the requirements of the federal constitution, must comply with the requirements of 42 U.S.C. §1973, as interpreted by the federal courts.

21. Plaintiffs' Complaint does not raise the voting rights issue; nor was the issue fully considered on the record before the Master, although it was raised by Intervenors.

22. A full and fair hearing to adopt a constitutional congressional redistricting plan requires full and fair consideration of all plans tendered to the Court.

23. The Special Master did not provide a full and fair hearing to all plans tendered to the Court, including Intervenors' Amended Plan.

IN THE SUPREME COURT OF PENNSYLVANIA

ROBERT J. MELLOW, Senator, 22nd District, et al.,	:	
	:	No. 7 M.D. Misc. 92
Plaintiffs,	:	
v.	:	
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth et al.,	:	
Defendants.	:	

EXCEPTIONS OF INTERVENORS LOEPER, JUBELIRER, FISHER, LEMMOND, SALVATORE AND WENGER TO THE REPORT AND RECOMMENDATION OF THE MASTER

Intervenors F. Joseph Loeper, Robert C. Jubelirer, D. Michael Fisher, Charles Lemmond, Hank Salvatore and Noah Wenger, by their attorneys, hereby file the following exceptions to the findings, recommended decision and form of order of this Court's Master, Honorable David W. Craig, filed on February 24, 1991:

1. The Master erred in enforcing an arbitrary deadline for submission of redistricting plans, which prevented the submission,

amendment, correction of errors and refinement of plans to safeguard the public interest and constitutional and statutory rights.

2. Finding of Fact 15 is in error insofar as it characterizes the proceedings involving the amended version of the Loeper Plan:

a. At the commencement of the evidentiary hearing, before taking any evidence, the Commonwealth Court (per President Judge David W. Craig) accepted the amended version of the Loeper Plan (referred to in Finding of Fact 15 as "Loeper Plan 2"). The record shows that counsel for the Loeper Intervenors stated:

> Your Honor we did file a plan that was the plan passed by the State Senate. We have brought with us this morning a corrected plan and map that we would like to offer to the Court for its consideration. (Transcript, Vol. I, at 17)

. . .

THE COURT: Okay. Frankly, this would be the only exception I would make. Again recognizing that there is a party or partisan aspect of this, I just want to make sure all viewpoints are represented.... (Transcript, Vol. I, at 18)

. . .

The record also shows that, immediately following the Court's acceptance of Loeper Plan 2 for consideration, counsel for the O'Donnell Intervenors objected and was overruled:

THE COURT: I am being very liberal on this. Go ahead.

MR. MOORE: Just for the record, we would object.

THE COURT: I will overrule that objection. (Transcript, Vol. I, at 19)

Accordingly, Finding of Fact 15 is erroneous when it states that the Court "deferred ruling on its admission for consideration as a statewide plan." (Emphasis in original.)

b. At the conclusion of evidence on proposed statewide plans, President Judge Craig (by then acting as Master) reversed his earlier ruling and stated as follows:

THE COURT: The Loeper parties have not withdrawn the original plan. It is still before us. I rule that the amended plan is not allowable for consideration as a plan. I admit the exhibits for the sole purpose of showing the deficiencies in the Loeper original plan. (Transcript, Vol. I, at 141)

Finding of Fact 15 contradicts the record insofar as it states that Loeper Plan 2 was rejected by the Master "because it had not been timely filed by February 11." (Emphasis in original.) The record shows that the Court viewed the basis for rejecting it as the purported failure of the Loeper parties to withdraw Loeper Plan 1. Additionally, Finding of Fact 15 is erroneous in its characterization of the purpose for which the Loeper Plan 2 exhibits were admitted. The record shows that the Master allowed their admission solely for the purpose of showing the deficiencies in Loeper Plan 1. Findings of Fact that are unsupported by the evidence must be reversed or vacated. See Marrazzo v. Scranton Nehi Bottling Co., 422 Pa. 518, 525, 223 A.2d 17, 21 (1966) ("It is horn book law that the fact finder, whether it be a jury or the court, may not be

permitted to reach its verdict or decision merely on the basis of guess or conjecture, but that there must be evidence, direct or circumstantial, upon which logically its conclusion may be based.").

3. The Master erred in excluding the amended Loeper Plan from consideration as a statewide plan. After having allowed the Loeper Intervenors to proceed on the basis of an amendment to their original plan, it was an abuse of discretion for the Master subsequently to refuse to accept the amended plan for consideration. The Master's stated reason for refusing to consider the plan, i.e., that the "Loeper parties have not withdrawn the original plan" is illogical. Since the record shows that counsel for the Loeper Intervenors asked for and received permission to amend the Loeper original plan, the Loeper original plan was no longer before the Court at the close of the hearing. A plan that is amended is no longer the same plan. Furthermore, the Loeper Intervenors were prejudiced by the Master's subsequent ruling: in reliance on his initial ruling allowing consideration of an amended plan, they proceeded to make a record on the amended plan. Such prejudice, because of reliance on a court's ruling, constitutes grounds for reversal. See Mapp v. Dube, 330 Pa. Superior Ct. 284, 479 A.2d 553 (1984) (evidentiary error, whether of omission or admission, if it could have affected the result, is prejudicial and grounds for a new trial). Most importantly, however, this case concerns federal constitutional rights arising under Article I Section 2 of the United States Constitution and under the Fourteenth Amendment to the Constitution and federal law implementing rights established under the Fourteenth Amendment. Because the Court's decision affects the voting rights of all Pennsylvanians and the Court is free to construct a new plan if necessary to meet constitutional and statutory requirements, the Court has a duty to consider every plan that was presented to it, especially when evidence was heard on such a plan and all parties had the opportunity to cross-examine with respect to that plan. See e.g., Carstens v. Lamm, 543 F. Supp. 68 (D. Colo. 1982) (court considered 22 submitted plans in adopting one which met

constitutional requirements of one man, one vote and protected minority voting rights).

. . . .

5. The Master's Report fails to make adequate findings regarding the protection of minority voting rights from dilution. The discussion in the Master's Report (pp. 22-26) recognizes that all the statewide plans accepted for consideration proposed to reduce the African-American population in Philadelphia's 2nd Congressional District from its present 81 percent to a substantially lower percentage. The Master's recommended plan, Plaintiff's Plan 2, reduces the African-American population in the 2nd District to 62 percent. Other plans are either higher or lower for the 2nd Congressional District, but all are lower than the current percentage African-American population. When considering a plan that intentionally reduces minority population below the benchmark of 65% in a majority-minority Congressional district, the Court has a duty to make an inquiry on the record to assure itself that the reduction is harmless to their interests. See Martin v. Mabus, 700 F. Supp. 327 (SD Miss. 1988) (Court adopted a plan that had a 60% majority-minority judicial district because evidence in record that basically the same district in other elections had elected minority candidates show that the 65% presumed necessary for such a district was not necessary). A court would do so in many cases that do not involve constitutional rights. In class action litigation, for example, the Court will inquire into the fairness and justice of a proposed compromise, pursuant to Rule 23(e) of the Federal Rules of Civil Procedure, before approving an agreement. See Watson v. Ray, 90 F.R.D. 143, 146 (S.D.Iowa 1981) (When settlement in class suit is under consideration, this rule requires court to act as fiduciary preserving and guarding right of absent class members; court cannot assume passive rule when issue of settlement of class action is before it). In this case, involving constitutional rights, it is essential that such an inquiry be made before the Court approves a plan that dilutes minority rights when they are to be reduced below the classic super-majority of 65 percent African-American population that has been widely accepted

and endorsed. See Ketchum v. Burns, 740 F.2d 1398 (7th Cir. 1984), cert. denied 471 U.S. 1135. The Mellow Plaintiffs, who were the proponents of reducing the African-American population of the 2nd Congressional District to 62 percent, had the burden of demonstrating that their plan was not intended to, and would not have the effect of, impairing minority voting. They did not meet that burden. Their evidence consisted solely of a page in Plaintiff's Exhibit 2 that compared four different municipal elections in Philadelphia. This data was not authenticated by the Plaintiffs. In cross-examination it was shown that Plaintiffs' witness did not know who provided the handwritten voting summaries that were the basis for this exhibit. (R. 1, pp. 86 and 87) The witness also admitted in cross-examination that there were differences in voting patterns between municipal election years, used in his reported data, and Congressional election years. (R. 1, p. 90) Counsel for Loeper Intervenors made a timely objection to the admission of this evidence (R. 1, pp. 193-194), which objection was overruled by the Court. This evidence has no probative value and cannot be used to support any conclusions regarding the impact of Plaintiffs' Plan No. 2 on the dilution of minority population in Congressional District No. 2. It was error for the Master to admit the document, but, even as admitted, it has no probative value.

6. The Master erred in failing to make findings regarding the dilution in minority population that would be effected in Allegheny County by all statewide plans accepted for his consideration. The record shows that the present African-American population in Pittsburgh's 14th Congressional District is 23 percent: Loeper Exhibit 12, which shows minority statistics for all existing Congressional districts, was accepted by all parties and used by the parties and the Court during the proceedings. The plan recommended by the Master will reduce the African-American population in the 14th District to 17.81 percent. All other plans, except the Loeper plans, similarly reduced minority population in the 14th District below 20 percent. See Brief for Intervenors Loeper et al., Exhibit C. Yet the Master made no findings that these reductions would be harmless to minority voters in Allegheny

County. For non-majority/minority districts this is error that must be corrected. See Armor v. Ohio, 773 F. Supp. 1044 (1991). Unfortunately, the record is closed and there is no basis in the expedited and truncated proceedings before the Master to make appropriate findings with respect to other plans, although the Loeper plans were demonstrated to have been drawn with the express purpose of adding minorities to protect to the extent practicable the present level of minority population in the 14th Congressional District.

7. The Master erred in the legal standard he applied to the selection of a plan. The standard articulated by the Master in his report is an arguably appropriate standard by which a court would review a legislatively enacted reapportionment plan. As set forth in the Brief for Intervenors' Loeper, et al., it is an inappropriate standard when a court is choosing between plans or drawing its own plan. In the latter situation, which prevails in the instant case, the Master should have chosen a plan that approached equality of population as nearly as practicable while also protecting constitutional and statutory voting rights. The Master's report engages in a wide-ranging balancing of many factors that is inappropriate for the judicial process. It should not be accepted for this reason.

8. Plaintiffs' Plan 2, recommended by the Master, has an unacceptably high deviation from equal population. The maximum deviation found by the court for this plan is .0111% (although the true deviation is different, as shown in Exception 9, below). In contrast, O'Donnell Plan B has a maximum deviation of .0083% and the Loeper Amended Plan has a maximum deviation of .00954%. (Loeper Plan II has an average deviation of .0005143% while O'Donnell Plan B has an average deviation of .0027%). Applying the proper standard that a court should use when adopting or approving its own plan, Plaintiffs' Plan II must be rejected since its deviation from the "ideal" population is plainly not as low as practicable.

9. The Master erred in accepting Plaintiff's Plan 2 since such plan contains reported district populations totalling 11,881,677 which is 34 more people than officially reported by the Census Bureau for the Commonwealth. As a result, the Master has relied on maximum deviation and average deviations for the chosen plan which are erroneous. Furthermore, acceptance of Plaintiff's Plan 2 is error in that such plan is not contiguous in the recommended 16th Congressional District because a populated portion of Birmingham Township, Chester County is separated from the balance of the 16th District by a portion of its recommended 7th District.

10. The Master's Report errs in recommending a plan for Allegheny County that produces a result contrary to the Report's own Findings of Fact 27 and 29. The recommended plan violates the communities of interest described by the Master by unnecessarily extending an appendage from the proposed 18th District into the South Hills of Allegheny County, thus dividing the South Hills into three districts. The recommended plan intentionally gerrymanders the County to defeat an incumbent of the opposite party from the plan's proponents, with the collateral effect of diluting minority voting influence in the 14th District.

. . . .

12. The Master erred in not recommending the adoption of the Loeper Amended Plan. For reasons stated above, the Loeper Amended Plan should have been accepted for consideration by the Master. This Court should still consider it. It has superior maximum deviation in population to all plans except O'Donnell Plan B but is superior to all plans (including O'Donnell Plan B) in average deviation. See Court Exhibit AA and Brief of Intervenors Loeper, et al., page 14, for tabulation of deviations. The Loeper Amended Plan is also superior to all other plans in protecting and enhancing minority voting interests. It is most protective of the minority voting population of the Fourteenth District, protects a classic super-majority in Philadelphia's Second Congressional

District and creates a strong minority influence in Philadelphia's First Congressional District with a combined African-American and Hispanic population of over 60%. (In contrast, O'Donnell Plan B manipulates minority populations in Philadelphia and in Allegheny County adversely to minority interests. Plaintiffs' Plan 2 does the same in Allegheny County.)

SUBJECT: REVISED FINAL MEMO
Required Information--EACH Plan of Party Responding Here

TO: Counsel

FROM: President Judge David W. Craig

1. HB or SB, if any, embodying plan(s)--Add specific Printer's No. for each plan.

Amendment A0539 to SB 205 2/11/92
Defeated 73-122 with bipartisan support & bipartisan opposition

2. Maximum range of deviation, in percentage.

.0000265 (+9 persons high; -6 persons low)

3. Average deviation, in percentage.

.0000025 (14 districts zero deviation)

4. Number of municipalities (including counties) split.

97 (30 counties; 67 municipalities)

5. Number of election precincts split.

50 (20 in Phila.; 30 in Allegheny)

6. Estimated political party balance of Pennsylvania congressional delegation, in number of seats.

11 Democrat 10 Republican
(based on voter registration of districts)

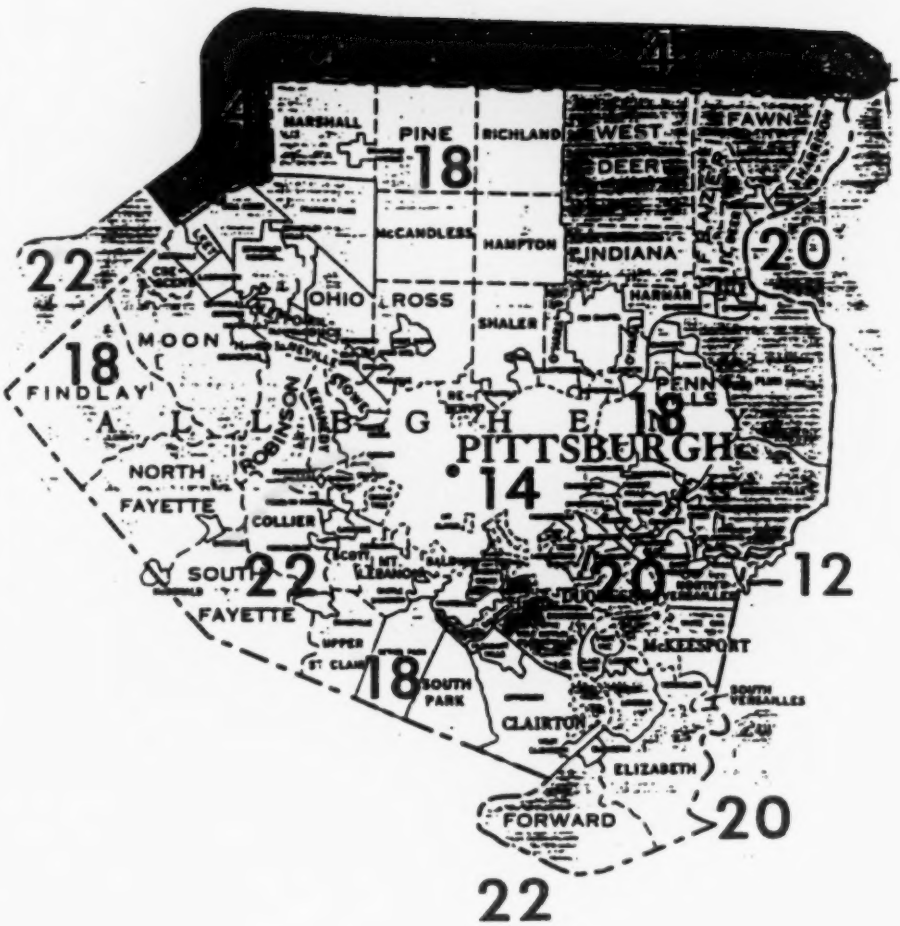
7. Percentage of (1) African-American population, and (2) African-American voting age population, in each Philadelphia congressional district proposed.

(1)	*Dist. 1*	*.475*	*(2)*	*Dist. 1*	*.442*
	2	*.666*		*2*	*.634*
	3	*.0384*		*3*	*.036*

Note: Percentages shall be to at least three points to right of decimal point, e.g., .XXX.

/s/ Joseph W. Murphy

Counsel for Ryan



BEST AVAILABLE COPY

No. 91-2015

Supreme Court, U.S.
FILED
JUL 13 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

F. JOSEPH LOEPER, ROBERT C. JUBELIRER, D. MICHAEL FISHER, CHARLES LEMMOND, HANK SALVATORE, NOAH WENGER, and MATTHEW RYAN, *Petitioners*,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Pennsylvania Supreme Court deny petitioners due process by establishing a deadline for the submission of proposed congressional redistricting plans and excluding certain of petitioners' plans as untimely for failing to meet that deadline?

2. (a) Did the Pennsylvania Supreme Court violate Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, by adopting a congressional redistricting plan that reduced the percentage of African-Americans in Pennsylvania's 2nd Congressional District (Philadelphia) below 65% when the evidence showed that, even with this reduction, the African-American community would continue to be able to elect the candidate of its choice in that district?

(b) Should this Court consider whether the Pennsylvania Supreme Court's plan violated Section 2 with respect to the 1st Congressional District (also in Philadelphia) when petitioners did not assert such a violation in the court below?

(c) Did the Pennsylvania Supreme Court violate Section 2 with respect to the 14th Congressional District (Pittsburgh) by reducing the African-American percentage in that district from 23% to 17% when neither petitioners nor anyone else offered any evidence that this reduction would dilute minority voting strength?

3. Should this Court decide whether the decision of the Pennsylvania Supreme Court improperly ignored the policies of the last legislatively enacted redistricting plan when petitioners never raised this issue in the court below?

4. Did the Pennsylvania Supreme Court misapply this Court's decision in *Karcher* v. *Daggett*, 462 U.S. 725 (1983), by holding that the 0.0111% variance between the populations of the most and least populous congressional districts was justified by a desire to avoid unnecessarily splitting counties and municipalities?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-2015

F. JOSEPH LOEPER, ROBERT C. JUBELIRER, D. MICHAEL FISHER, CHARLES LEMMOND, HANK SALVATORE, NOAH WENGER, and MATTHEW RYAN, *Petitioners*,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, *et al.*, *Respondents.*

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

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BRIEF IN OPPOSITION

Respondents oppose the petition for a writ of certiorari to the Supreme Court of Pennsylvania.[1] For the reasons

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[1] This opposition is being filed on behalf of the following respondents: (a) Brenda K. Mitchell, Secretary of the Commonwealth of Pennsylvania, and William Boehm, Commissioner of the Bureau of Commissions, Elections, and Legislation (the "Mitchell Respondents"); (b) State Senators Robert J. Mellow, J. William Lincoln, Leonard J. Bodack, Michael A. O'Pake, Patrick J. Stapleton, Jeanette F. Reibman, Vincent J. Fumo, and H. Craig Lewis (the "Mellow Respondents"); and (c) Albert Swann, the Frederick Douglass Society, the Philadelphia Leadership Conference, and State Representatives Harold James, Vincent Hughes, Anthony Williams, and Curtis Thomas (the "Douglass Respondents").

described below, the petition should be denied and the judgment of the Pennsylvania Supreme Court left undisturbed.

STATEMENT OF THE CASE

This case involves the reapportionment of Pennsylvania's congressional districts. Petitioners, who are members of the Pennsylvania Senate and House of Representatives, seek review of a judgment of the Pennsylvania Supreme Court adopting a congressional redistricting plan for the Commonwealth. Respondents include (a) the officials with statutory responsibility for administering elections in Pennsylvania (the Mitchell Respondents), (b) the State Senators who advocated the adoption of the plan chosen by the Pennsylvania Supreme Court (the Mellow Respondents), and (c) certain individuals and groups that intervened on behalf of African-American voters in Philadelphia (the Douglass Respondents).

During the 1980's, Pennsylvania had 23 congressional districts. Appendix to the Petition for a Writ of Certiorari ("App.") at A18; *see* Pa. Stat. Ann. tit. 25, § 3571 (reprinted in App. at A117-A127) (describing the counties and census units within each district). As a result of population shifts, however, Pennsylvania's congressional districts had become substantially unequal in population by 1990, and the Commonwealth had also "lost" two congressional seats. App. at A2, A19. Thus, the Pennsylvania General Assembly faced the task of devising a reapportionment plan containing 21 districts of equal population in order to comply with this Court's decision in *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964), which held that, as nearly as is practicable, congressional districts within a State must have the same number of people (the "one person, one vote" requirement). Unfortunately, the General Assembly was unable to enact a redistricting plan. App. at A2.

On January 28, 1992, the Mellow Respondents filed an equity action against respondents Mitchell and Boehm in the Commonwealth Court of Pennsylvania, which has jurisdiction over election law disputes. App. at A2; *see* 42 Pa. Cons. Stat. Ann. § 761. Noting that February 18, 1992, the last day for congressional candidates to file nomination petitions, was fast approaching, the Mellow Respondents asked the Commonwealth Court to declare the existing congressional apportionment law (Pa. Stat. Ann. tit. 25, § 3571) unconstitutional; to enjoin the implementation of the official congressional election schedule until a valid plan could be adopted; and to adopt a valid reapportionment plan if the General Assembly remained unable to do so. App. at A2.

At the same time, the Mellow Respondents also applied to the Supreme Court of Pennsylvania to take plenary jurisdiction of the matter. App. at A3; *see* 42 Pa. Cons. Stat. Ann. § 726 (Supreme Court "may, . . . upon petition of any party, in any matter pending before any court . . . of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done").

Senior Judge Barry of the Commonwealth Court held a hearing and granted a preliminary injunction on January 30, 1992, holding that the existing 23-seat apportionment plan was unconstitutional and enjoining the further use of this plan and the implementation of the congressional election schedule. App. at A2, A100-A101. The evidence presented at the preliminary injunction hearing demonstrated that it was critical for the Commonwealth to hold its primary on the scheduled date of April 28, 1992.[2] The evidence also demonstrated that the boundar-

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[2] The evidence showed that the Commonwealth had planned a "unified" primary (*i.e.*, one in which presidential and State legislative candidates as well as candidates for Congress would stand for

ies of Pennsylvania's congressional districts had to be fixed well in advance of that date in order for the primary to take place in timely fashion.[3]

Judge Barry's order required all parties and intervenors, if any, to submit their proposed reapportionment plans to the Commonwealth Court no later than February 11, 1992. App. at A2, A101. His order also provided notice that the court would proceed to select a plan if the Legislature failed to enact a redistricting plan by February 11, 1992. App. at A2, A101. Petitioners never sought an extension of these deadlines.

On or before February 11, pursuant to the Commonwealth Court's order, the Mellow Respondents submitted three plans, known as Plaintiffs' Plans 1, 2, and 3. App. at A3. (Plaintiffs' Plan 3 was later withdrawn. App. at A3.) On or before February 11, numerous other parties moved to intervene and offered plans of their own. App. at A3, A20-A21. The intervenors included petitioners, who submitted a plan known as "Loeper Original" or "Loeper 1." App. at A21; Petition for a Writ of Certiorari

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election) and that, if congressional districts were not drawn in time for the primary, the Commonwealth would either have to postpone the entire primary (thereby decreasing Pennsylvania's influence on the presidential nominations) or hold a separate congressional primary (thereby resulting in additional costs to the Commonwealth of $5-6 million). *See* Respondents' Appendix ("Res. App.") (attached hereto) at 8a-9a.

[3] Until congressional district lines had been drawn, the Secretary of the Commonwealth, the 67 county Boards of Election within the Commonwealth, and the candidates themselves could not begin taking the many steps necessary to prepare for elections. These steps included the circulation by candidates of nomination petitions, the filing of completed petitions with the Secretary of the Commonwealth, the filing of challenges to such petitions, the resolution by the Commonwealth Court of such challenges, the final certification of candidates' names, the mailing of absentee ballots to military voters stationed outside the Commonwealth, and the printing and mailing of ballots and labels for voting machines. *See* Res. App. at 6a-8a.

("Pet.") at 4. Among the other intervenors were the Speaker of the Pennsylvania House of Representatives and other members of the House leadership, who proposed two plans (App. at A20), a group of 11 members of Congress, who submitted a single plan (App. at A20-A21), respondent Harold James (one of the Douglass Respondents), who filed a plan on behalf of African-American voters in Philadelphia (App. at A20), and four groups representing regional interests, who offered their views on how the proposed plan affected particular regions (App. at A21). After February 11, other parties sought and were allowed to intervene, including the remaining Douglass Respondents, who intervened on behalf of African-American voters, and petitioner Ryan. App. at A21. Thus, contrary to what petitioners claim (Pet. at 8), a broad range of interests was represented in the Commonwealth Court and the court had before it a wide range of plans from which to choose.

The General Assembly was unable to enact a reapportionment plan by the court's February 11 deadline. App. at A2. Accordingly, on February 12, the Commonwealth Court ordered hearings to begin the next day to consider all proposed plans that had been timely filed on or before February 11, 1992. App. at A2-A3. On February 13, shortly after the hearings began, the Pennsylvania Supreme Court took plenary jurisdiction of the matter. App. at A3, A106. The Supreme Court designated President Judge David Craig as its Master and directed him to report to the Supreme Court by February 26, 1992. App. at A3, A106.

On the first day of the hearings, petitioners submitted two additional plans for the court's consideration. The first was offered by petitioner Ryan, who frankly admitted that he had filed his motion to intervene and his proposed plan on February 12, a day after the court's deadline. Res. App. at 13a. As noted above, Judge Craig allowed petitioner Ryan to intervene, but refused

to permit him to present his untimely plan. Res. App. at 13a.

The second plan was offered by petitioner Loeper and was known as the "Loeper Amended Plan" or "Loeper 2." Petitioners' counsel characterized it as "essentially the plan that we filed on the 11th, with some very minor fine tuning." Res. App. at 12a. The testimony revealed, however, that the Loeper Amended Plan was quite different from its predecessor. The "very minor fine tuning" made by petitioners involved moving hundreds of thousands of people among various districts. Res. App. at 15a-21a. The effect of these changes was to make the proposed districts substantially more equal in population than in Loeper 1 and to alter the racial make-up of the 1st and 2nd Congressional Districts in Philadelphia.[4]

Because these changes had not been offered until after the February 11 deadline, Judge Craig excluded the Loeper Amended Plan as untimely. App. at A22-A23; Res. App. at 22a-23a. Thus, petitioners are simply wrong when they claim that they were "penalized" (Pet. at 6) for attempting to amend their plan. The fact of the matter is that the Loeper Amended Plan was excluded because it was not filed in a timely fashion.

At the hearings, there were two principal issues on the merits: whether the proffered plans satisfied the "one person, one vote" requirement and whether the plans complied with Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, which prohibits redistricting

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[4] The changes lowered the maximum percentage deviation (the key measure of population equality, which is defined as the percentage by which the most populous district exceeds the ideal district population plus the percentage by which the least populous district falls short of the ideal) more than tenfold, from 0.13344% to 0.00954%. App. at A147. These changes also had the effect of increasing the African-American population of the 1st Congressional District from 46.686% to 49.048% while lowering it in the 2nd Congressional District from 68.055% to 65.857%. App. at A147.

plans that deny protected minority groups an equal opportunity "to participate in the political process and to elect representatives of their choice."

On February 24, 1992, Judge Craig issued his "Findings, Recommended Decision and Form of Order" (App. at A16), recommending adoption of Plaintiffs' Plan 2, which had been proposed by the Mellow Respondents. App. at A44. Petitioners and others then filed exceptions to Judge Craig's findings and recommendations with the Pennsylvania Supreme Court (App. at A3, A5), and oral argument was held on Saturday, March 7, 1992. App. at A3.

The Pennsylvania Supreme Court issued a per curiam order on March 10, 1992, adopting Judge Craig's recommendation of Plaintiffs' Plan 2 and dismissing all the exceptions. App. at A3. In an opinion issued on March 26, the Pennsylvania Supreme Court held that Plaintiffs' Plan 2 satisfied the "one person, one vote" requirement. App. at A7. The court reasoned that the plan had a maximum percentage deviation of only 0.0111% (far less than deviations permitted in other recent congressional redistricting cases) and that this deviation was justified by a desire to avoid splitting counties, municipalities, and precincts any more than necessary to comply with the one person, one vote rule. App. at A7. With respect to the Voting Rights Act issue, the Pennsylvania Supreme Court rejected petitioners' claim that the 2nd Congressional District had to be 65% African-American in order to give African-Americans an equal opportunity to elect candidates of their choice. App. at A10-A12. The court held instead that Plaintiffs' Plan 2, which made this district only 62% African-American, nonetheless preserved minority voting strength in the district. App. at A10-A12. Finally, the Pennsylvania Supreme Court held that Judge Craig had acted properly in excluding petitioners' late-filed plans. App. at A14-A15.

SUMMARY OF ARGUMENT

1. The Pennsylvania courts acted entirely properly in setting a deadline for the submission of proposed redistricting plans and in excluding two plans proffered by petitioners after that deadline. The State courts were faced with a consolidated primary election for presidential as well as congressional and State legislative candidates scheduled for April 28, 1992, a date that could not be changed without either costing the Commonwealth substantial sums or reducing the influence of the Commonwealth's voters on the presidential election process. In order for the primary to take place on April 28, 1992, the Commonwealth's election officials needed substantial "lead time," *e.g.*, to allow prospective candidates to familiarize themselves with new district boundaries and circulate nomination petitions, to give State courts adequate time to resolve challenges to such petitions, and to print and distribute regular and absentee ballots. In order to allow time to prepare for the primary as scheduled, the State courts had to have a redistricting plan in place as soon as possible. Consequently, the State courts were fully justified in ordering all parties and prospective intervenors (including petitioners) to submit proposed redistricting plans within a twelve-day time period ending on February 11, 1992. Petitioners never moved to extend this period; instead, they simply disregarded it and submitted a plan late (in the case of petitioner Ryan) or attempted to evade it by mischaracterizing an untimely plan as involving merely technical corrections to a previous, timely filed plan (in the case of petitioners Loeper, *et al.*). Under the circumstances, the State courts acted entirely properly in refusing to admit these untimely plans. Petitioners' arguments to the contrary raise no substantial federal issue.

2. Petitioners' contention that the Pennsylvania Supreme Court failed to make adequate factual findings regarding the effect of its plan on minority voting rights likewise presents no issue warranting review.

a. With respect to the 2nd Congressional District (which is located almost entirely within Philadelphia), petitioners claim that the Pennsylvania Supreme Court failed to justify reducing the African-American percentage in this district below 65% of the total population. Yet, contrary to what petitioners argue, there is no presumption that a district should be 65% African-American in order to enable the African-American community to have an equal opportunity to elect the candidate of its choice. Hence, there is no conflict between the present case and other decisions. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, commands courts to examine the "totality of circumstances" regarding an allegedly discriminatory districting plan, an approach that requires courts to evaluate carefully the facts of each case instead of assuming that a district must contain a particular percentage of minorities in order to comply with the statute.

b. Petitioners did not argue below that the factual findings regarding the 1st Congressional District (which is also located in Philadelphia) were inadequate; consequently, they may not raise such an argument here. In any event, petitioners have mischaracterized the Pennsylvania Supreme Court's analysis of this district. The Pennsylvania Supreme Court did not hold that African-American majority districts must be created wherever possible. Rather, the court held that the redistricting plans proffered by petitioners and other parties, all of which had lower African-American percentages in the 1st District than the plan chosen by the court, would have diluted minority voting strength. Thus, no conflict exists between the case at bar and cases from other jurisdictions holding that there is no obligation to create African-American majority districts wherever possible.

c. With respect to the 14th Congressional District (which contains Pittsburgh and certain of the surrounding suburbs), petitioners argue that the Pennsylvania

Supreme Court should have made some sort of inquiry to ensure that the reduction in the percentage of African-Americans living in this district (from approximately 23% under the 1982 plan to approximately 17% under the plan at issue here) did not impair minority voting strength. However, petitioners never offered any evidence whatsoever that this reduction would in any way dilute the voting power of the African-American community in this district. Consequently, petitioners' claim that this district violates Section 2 fails for want of proof.

3. Petitioners assert that, in choosing a plan, the Pennsylvania Supreme Court failed to give deference to the district configurations adopted by the Pennsylvania General Assembly in 1982, as supposedly mandated by *White* v. *Weiser*, 412 U.S. 783 (1973). But petitioners did not argue below that the court should adhere to the 1982 district lines to the extent possible, and accordingly they may not rely on that argument here. Even if petitioners had raised the argument below, it does not justify the granting of the petition because the evidence demonstrates that the Pennsylvania Supreme Court's plan did a better job than petitioners' plan of conforming to the 1982 district configurations.

4. Finally, petitioners claim that the Pennsylvania Supreme Court erred in holding that the 0.0111% variance between the populations of the most and least populous districts was justified by the policy of preserving the boundaries of counties and municipalities. According to petitioners, the court was wrong to accept this justification because there is no State constitutional or statutory provision that reflects a policy that counties and municipalities be kept whole to the extent possible in congressional redistricting. What petitioners ignore, however, is that because the Pennsylvania Supreme Court is the highest court in the Commonwealth, its decision is determinative of the question of whether Pennsylvania law recognizes such a policy. Accordingly, petitioners' arguments do not merit the granting of certiorari.

REASONS FOR DENYING THE WRIT

I. NO ISSUE FOR REVIEW IS RAISED BY THE PENNSYLVANIA SUPREME COURT'S DECISION THAT ALL REDISTRICTING PLANS HAD TO BE SUBMITTED TWELVE DAYS AFTER THE COURT'S ORDER AND THAT THE PARTIES WOULD NOT BE ALLOWED TO SUBMIT NEW OR AMENDED PLANS AFTER THAT DEADLINE.

Notwithstanding petitioners' claims that the Pennsylvania Supreme Court's exclusion of their plans was "arbitrary" and "inconsistent with due process" (Pet. at 7, 10), the Pennsylvania Supreme Court's decision presents no issue worthy of review by this Court. The court's order establishing a deadline for submitting plans was entirely consistent with the long-recognized right of courts to control their dockets. *See generally Landis* v. *North American Co.*, 299 U.S. 248, 254-55 (1936). Had petitioners moved for a continuance to enable them to submit new redistricting plans or to offer additional evidence, the granting or denial of their motion would have been within the discretion of the trial judge, and reversal would be appropriate only if the trial judge had abused his discretion or acted so arbitrarily as to violate due process. *See, e.g., Ungar* v. *Sarafite*, 376 U.S. 575, 589-91 (1964); *Fontenot* v. *Upjohn Co.*, 780 F.2d 1190, 1193 (5th Cir. 1986).

An even more stringent standard should apply here, because petitioners never sought such a continuance. Instead, petitioner Ryan unilaterally decided to ignore the deadline and to submit a redistricting plan late. Now, Ryan (and the other petitioners) seek relief from the deadline by arguing that Judge Craig's adherence to the deadline deprived them of a full and fair hearing. The integrity and finality of our judicial process could not endure if every litigant was granted such absolution.

Enforcement of the February 11 deadline and the holding of an expedited hearing were necessary to allow

the court sufficient time to consider all timely filed plans as quickly as possible. Such a speedy resolution was necessary because of the upcoming primary on April 28, 1992, and the Commonwealth's requirement for a significant amount of "lead time" to prepare for it. *See* p. 4, *supra*. As Judge Craig explained:

> All parties have had *many months* to prepare a proper plan.
>
> If the court had opened this time-constrained case to late plans and amendments filed after the February 11 deadline plainly stated in Judge Barry's order, the proceedings would have been endless because (1) new intervenors would have required many new plans to be reviewed, and (2) the earlier parties could have amended their timely plans repeatedly, to surpass the new plans.
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> . . . .
>
> Exclusion of full consideration of the Ryan Plan was justified because that plan was in existence on and before February 11. There was no reason that the plan could not have been timely presented. It was knowingly withheld from being filed in the court on that date, on the ground that further legislative action then was possible.

App. at A23-A24 (emphasis in original). The Pennsylvania Supreme Court affirmed, holding that

> Judge Craig's rigid adherence to the February 11, 1992, deadline was absolutely correct. The parties complaining had ample notice of the deadline and should have been well aware of its importance as they would be of any statute of limitations or other judicial order imposing a time deadline. Not to adhere to the deadline imposed would create or would have created chaos and we will not countenance such a result.

App. at A14-A15. In short, because petitioner Ryan's proposed plan was untimely, he has no right to complain about its exclusion.

For the same reasons, the Loeper petitioners' assertion that Judge Craig wrongly refused to consider their amended plan is without merit. Indeed, the Loeper petitioners have even less right to relief than petitioner Ryan because they mischaracterized the Loeper Amended Plan to the Master. The Loeper petitioners represented to the court that the amendment only made very minor corrections to their previous, timely filed plan. Res. App. at 12a. In fact, the evidence showed, and the court concluded, that the amended plan was qualitatively different from the original. *See* p. 6, *supra*. Consequently, Judge Craig excluded this plan as untimely (App. at A23), and the Pennsylvania Supreme Court rightfully upheld this ruling. In sum, petitioners simply should not be permitted to cast their mistaken strategy of ignoring the February 11 deadline as a judicial error of constitutional dimensions.

Perhaps sensing the weakness of their argument regarding the deadline, petitioners seek to bolster it by arguing that the combination of the deadline and the expedited hearing before the Master conflicts with other cases that purportedly require "full and fair hearings" when a court adopts a redistricting plan. Pet. at 8. Yet none of the cases on which petitioners rely (Pet. at 8-9) actually addresses the issue of how much time a court must spend considering plans in order to satisfy the Due Process Clause.

In addition to their arguments regarding the exclusion of their plans and the supposedly undue abbreviation of the evidentiary hearing, petitioners also suggest that a "fiduciary duty, similar to that imposed on courts considering class action settlements and school desegregation cases, should be imposed" on courts to "take affirmative steps to obtain all information needed to assure that the plan complies with constitutional, statutory and caselaw requirements." Pet. at 11. In essence, petitioners' fiduciary duty argument represents another desperate at-

tempt to rectify their failure to meet the court's deadline by creating a heretofore unknown procedural requirement for courts to make affirmative inquiries to obtain "*all* information." Pet. at 11 (emphasis added). Obviously such a standard, which would result in endless litigation with an infinite number of plaintiffs and plans, does not exist and should not. In short, petitioners' fiduciary duty argument, like their other arguments regarding the deadline for submitting plans, must fail.

II. NO ISSUE FOR REVIEW IS RAISED BY THE PENNSYLVANIA SUPREME COURT'S DECISION UNDER THE VOTING RIGHTS ACT.

(a) Petitioners contend that the Pennsylvania Supreme Court violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (reprinted in App. at A116-A117), by reducing the percentage of African-Americans in the 2nd Congressional District (Philadelphia) from 81% to 62% of the total population of the district. Pet. at 11-12. To support this argument, petitioners point to the opposition of the incumbent African-American Congressman to the reduction, the fact that the 62% figure falls short of the 65% "benchmark" that petitioners claim is generally necessary to ensure effective representation of minority voters, and the absence of expert testimony regarding the effect of the reduction. Pet. at 12-13. None of these three points merits review by this Court.

Addressing the last point first, we note that although the Master refused to permit the Mellow Respondents to offer expert testimony, they did offer proof, which was expressly relied upon by the Pennsylvania Supreme Court, that a 62% district would in fact provide African-American voters an opportunity to continue to elect a representative of their choice. App. at A10. We must also note that the incumbent's victory in the April 28,

1992 primary confirms the validity of this finding.[5] Res. App. at 27a.

Second, petitioners' reliance on what they contend is a "generally accepted benchmark" of 65% (Pet. at 12) is misplaced. Section 2, in fact, does not establish any particular percentage as a "benchmark" for safeguarding minority voting strength, but rather requires courts to examine the "totality of circumstances" in determining whether African-Americans have an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973. *See Chisom* v. *Roemer*, 111 S.Ct. 2354, 2365 (1991) (all Section 2 claims must allege "an abridgement of the opportunity to participate *and* to elect representatives of one's choice"). As would be expected, this test has resulted in courts approving districts with total populations of African-Americans of less than 65%. *See, e.g., Harrison* v. *Pennsylvania Legislative Reapportionment Commission*, No. C.A. 92-0693, 1992 WL 95909, at *2 (E.D. Pa. Apr. 21, 1992) (upholding legislative reapportionment plan for Pennsylvania State Senate which contained four districts in Philadelphia with less than 62% African-American total population; court reasoned that 65% figure "is not a hard and fast rule, . . . nor is it a statutory requirement"); *Jordan* v. *Winter*, 604 F. Supp. 807, 814 (N.D. Miss.) (per curiam), *aff'd sub nom. Mississippi Republican Executive Committee* v. *Brooks*, 469 U.S. 1002 (1984).[6] Indeed, the very case that petitioners rely upon

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[5] Because the 2nd Congressional District has over 250,000 registered Democrats and only about 50,000 registered Republicans, the incumbent's success in the primary all but assures his re-election. *See* Res. App. at 25a. Moreover, all three of the incumbent's opponents in the general election are African-Americans.

[6] The Department of Justice has explained that

> "the Attorney General has frequently concluded, based on the facts presented in a particular submission, that districts containing a minority population significantly less than 65 percent

(Pet. at 12-13), *Burton* v. *Sheheen*, C.A. No. 3:91-2983-1, 1992 WL 106354 (D.S.C. May 1, 1992), approved districts that were less than 65% African-American.[7]

Here, the Master expressly found that there was no evidence that a 62% African-American district would pose a risk to minority voting strength. App. at A36. On the contrary, as discussed above, the Pennsylvania Supreme Court explicitly found that in this case "a 62% African-American district would suffice." App. at A12. Thus, there is simply no basis here for finding a Section 2 violation based on a so-called 65% "benchmark."

Finally, although the testimony at trial showed that the incumbent would have preferred a district that was approximately 70% African-American and that petitioners included such a district in their plan to "appease" him, Res. App. at 14a, the incumbent's opposition to any reduction of the African-American population in his district hardly evidences a violation of Section 2. To the contrary, as the Pennsylvania Supreme Court held, a desire to protect this incumbent

> does not mandate making the Second Congressional District almost 70% African-American when the result is to dilute African-American voting strength

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of the total are racially fair districts and that the plan submitted is entitled to Section 5 preclearance."

James v. City of Sarasota, 611 F. Supp. 25, 32-33 (M.D. Fla. 1985) (quoting letter of Department of Justice). In *James*, the court held that a district containing a 50.1% African-American total population and a 42.6% voting age African-American population was sufficient for purposes of Section 2, despite the existence of white bloc voting, because minority voter turnout had historically exceeded that of whites in the district. 611 F. Supp. at 27-29.

[7] In fact, even in *Ketchum* v. *Byrne*, 740 F.2d 1398, 1416 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985), the court recommended that the district court consider the "65% figure or some variation of it" only when "reliable, determinative statistics are not available." In this case, because reliable, determinative statistics were in evidence, it was not necessary to look to the 65% figure to insure fairness.

> in the neighboring First District, which is only 46.76% African-American under the Loeper Plan [as opposed to 52.356% under the plan adopted by the court] . . . . Although incumbency protection is not in and of itself an inappropriate consideration, it may not be accomplished at the expense of minority voting potential. *Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991).

App. at A12. In short, like petitioners' other arguments regarding the 2nd Congressional District, the incumbent's opposition to the racial composition of this district does not warrant review by this Court.

(b) The Pennsylvania Supreme Court's plan contains an additional district with an African-American majority, the 1st Congressional District, which is also located primarily within Philadelphia and which is 52.356% African-American. Petitioners contend the court's creation of this district was premised on the erroneous assumption that African-American majority districts must be created wherever possible. Pet. at 13-14.

At the outset, it should be noted that petitioners never raised this contention in the court below. *See* App. at A154-A156. Consequently, this issue is not properly presented to this Court for review. *See infra* at 20. Even if petitioners had preserved the point, they are incorrect in asserting that the Pennsylvania Supreme Court created a second African-American majority district in Philadelphia because it believed that "'[w]hen possible, an increase in the number of minority-in-the-majority districts is constitutionally required.'" Pet. at 13 (citation omitted). Although the Master's Findings, Recommended Decision and Form of Order included this language (App. at A34), the Pennsylvania Supreme Court based its decision on an altogether different ground, namely, that "other plans concentrate African-American voters in the Second Congressional District, thereby diluting the voting strength of African-American voters in

the First Congressional District." App. at A12.[8] Consequently, notwithstanding petitioners' claim to the contrary, there is no conflict between the decision of the Pennsylvania Supreme Court and *Quilter* v. *Voinovich*, No. 5:91 CV-2219, 1992 WL 114748 (N.D. Ohio Jan. 31, 1992), *probable jurisdiction noted*, 1992 U.S. LEXIS 3271 (No. 91-1618 June 1, 1992), where the court rejected a *per se* requirement for the creation of minority-in-the-majority districts and found that African-Americans in Ohio had frequently been elected from districts that were less than 50% African-American.[9]

(c) Finally, petitioners contend that the Pennsylvania Supreme Court should not have reduced the African-American population in the 14th Congressional District (Pittsburgh) from approximately 23% to approximately 17% without an affirmative inquiry into the consequences of such a reduction. Even assuming, *arguendo*, that *Armour* v. *Ohio*, 775 F. Supp. 1044 (N.D. Ohio 1991), on which petitioners rely, was rightly decided, petitioners failed to make any showing such as that made in *Armour*. Indeed, petitioners never offered to put forward *any* evidence on this point in the State court proceedings. Consequently, the decision below does not conflict with that of any other court, and this issue, like petitioners'

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[8] In so holding, the Pennsylvania Supreme Court relied on this Court's statement in *Thornburg* v. *Gingles*, 478 U.S. 30, 46 n.11 (1986), that "Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." App. at A12.

[9] Petitioners also contend that the Pennsylvania Supreme Court had no evidence before it that a 52.356% majority of African-American voters in the First District would be "effective." Pet. at 13-14. This argument ignores the testimony that such a percentage of African-American voters in this district would, in fact, give African-Americans the opportunity to elect candidates of their choice. App. at A9.

other Section 2 claims, does not merit review by this Court.

III. PETITIONERS HAVE WAIVED THE ARGUMENT THAT THE PENNSYLVANIA SUPREME COURT ERRONEOUSLY FAILED TO DEFER TO THE POLICIES REFLECTED IN THE LAST LEGISLATIVELY ENACTED REDISTRICTING PLAN; BUT EVEN IF THEY HAD NOT WAIVED IT, THE ARGUMENT DOES NOT WARRANT REVIEW BY THIS COURT.

(a) Petitioners next argue that the Pennsylvania Supreme Court erred by failing to give deference to the policy choices reflected in the last legislatively enacted redistricting plan (*i.e.*, Pa. Stat. Ann. tit. 25, § 3571, which was enacted in 1982). In particular, petitioners claim that the Pennsylvania Supreme Court's plan "broke up" a "community of interest" in Allegheny County (which comprises Pittsburgh and its suburbs) that had been "recognized, and embodied as a legislative policy, in the previous redistricting statute." Pet. at 18. Petitioners failed to make this argument in the court below, however, and consequently they cannot raise it here.

Because petitioners seek review of a State court's judgment, they are required by Rule 14.1(h) of this Court to specify "the stage in the proceedings . . . at which the federal questions sought to be reviewed were raised . . . ." In an effort to satisfy Rule 14.1(h), petitioners cite to the exceptions they filed in the Pennsylvania Supreme Court protesting the Master's recommended decision. Pet. at 5, citing App. at A150-A158. Yet nowhere in these exceptions did petitioners contend that the Master should have adhered more closely to the district boundaries devised by the General Assembly in 1982. Instead, petitioners asserted only that the Master had

> (a) improperly excluded their proposed plans (App. at A150-A153, A157-A158),

(b) failed to make adequate findings of fact regarding protection of minority voting rights in the 2nd and 14th Congressional Districts (Philadelphia and Pittsburgh) (App. at A154-A156),

(c) employed the wrong legal standard by "engag[ing] in a wide-ranging balancing of many factors" rather than selecting a plan that "approached equality of population as nearly as practicable while also protecting constitutional and statutory voting rights" (App. at A156),

(d) chosen a plan with "an unacceptably high deviation from equal population" (App. at A156), and

(e) adopted a plan with mathematical errors and a discontiguous district (App. at A157).

Although petitioners also argued that the plan chosen by the Master violated communities of interest in Allegheny County (App. at A157), they never claimed that the Master thereby failed to give deference to the 1982 districting plan. To the contrary, petitioners' position below was that the 1982 plan contained a gerrymandered 4th Congressional District and that one of the supposed virtues of their proposed plans was that they "correct[ed]" this gerrymander. Res. App. at 24a. Thus, far from arguing that the 1982 plan warranted deference, petitioners actually took the opposite position in the court below. *See also infra* at 21 (describing other instances where petitioners' plan failed to follow the 1982 district lines).

In short, petitioners never argued below that the Pennsylvania Supreme Court should have adhered to the 1982 district boundaries to the extent possible in fashioning a redistricting plan. Consequently, petitioners should not be permitted to assert that argument here. *See, e.g.*, *Clark* v. *Jeter*, 486 U.S. 456, 459-60 (1988); *Bankers Life & Casualty Co.* v. *Crenshaw*, 486 U.S. 71, 76-80 (1988); *Board of Directors of Rotary International* v. *Rotary Club*, 481 U.S. 537, 549-50 (1987); *Heath* v. *Alabama*, 474 U.S. 82, 87 (1985).

(b) Even if petitioners had properly preserved their argument regarding deference to the 1982 plan, it still does not merit the granting of certiorari. Assuming, *arguendo*, that the Pennsylvania Supreme Court was required to defer to the policy choices reflected in the 1982 plan, the record shows that, in fact, it did so.

The Master's undisputed findings demonstrate that, overall, the Pennsylvania Supreme Court's plan did a better job than any of the other plans (including those offered by petitioners) of preserving the communities of interest recognized by the General Assembly in the 1982 plan. For example, under the 1982 plan, Berks and Schuylkill Counties were placed together in the 6th Congressional District (App. at A120), and the Master explicitly found that these counties "share a community of interest in a common economic base, in circulation arteries, and schools of higher education as well as other matters." App. at A38. Plaintiffs' Plan 2, the plan adopted by the Pennsylvania Supreme Court, keeps these two counties together; the Loeper Plan did not. App. at A39. Similarly, the 1982 plan placed North Middleton Township and the Borough of Carlisle together with similar communities in the 9th Congressional District. App. at A39, A125-A126. Once again, the Master found that Plaintiffs' Plan 2 "maintain[s] that relationship," while the Loeper Plan did not. App. at A39.

Having heard testimony on these and other "community-of-interest" claims asserted by representatives of various regions of the Commonwealth, the Master found that "The Plaintiffs' Plans 1 and 2 are the only plans which substantially satisfy all of the regional concerns." App. at A39. Petitioners have never challenged this finding. Thus, even if the Pennsylvania Supreme Court was required to choose "which of the plans before it was most consistent with the existing congressional reapportionment statute" (Pet. at 17), the undisputed facts demonstrate that the court did just that. Accordingly, there is

no need for this Court to review the question of deference to the 1982 plan.

IV. THE PENNSYLVANIA SUPREME COURT CORRECTLY HELD THAT THE POLICY OF PRESERVING COUNTY AND MUNICIPAL BOUNDARIES JUSTIFIED THE PLAN'S MINOR DEVIATIONS FROM POPULATION EQUALITY.

This Court has held that congressional districts within a State must have equal populations. *Wesberry* v. *Sanders*, 376 U.S. 1, 7-8 (1964). The Court has recognized, however, that "[p]recise mathematical equality . . . may be impossible to achieve in an imperfect world," *Karcher* v. *Daggett*, 462 U.S. 725, 730 (1983), and consequently has required only that "districts be apportioned to achieve population equality 'as nearly as is practicable.'" *Id.* at 736 (citation omitted).

In this case the redistricting plan adopted by the Pennsylvania Supreme Court has a total maximum deviation of only 0.0111%. To determine whether this deviation satisfies the "one person, one vote" standard, this Court has established a two-part test. *Id.* at 730. First, the party challenging a redistricting plan must show that "the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population." *Id.* The mere fact that a smaller population deviation was possible, however, does not render a plan *per se* unconstitutional. *Id.* at 740. Rather, the existence of plans with smaller deviations simply obligates a court to apply the second part of the test, *i.e.*, to determine whether the proponent of the plan has shown that "each significant variance between districts was necessary to achieve some legitimate goal." *Id.* at 731. Among the possible "legitimate state objective[s]" identified by the Court in *Karcher* were "making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoid-

ing contests between incumbent Representatives." *Id.* at 740.[10]

Petitioners argue that the Pennsylvania Supreme Court wrongly assumed that the permissible State objectives enunciated by this Court in *Karcher* were *per se* justifications for the deviations in the Pennsylvania Supreme Court's plan. Pet. at 20. Petitioners further claim that the Pennsylvania Supreme Court should have identified some State constitutional or statutory provision to support the conclusion that the need to preserve county and municipal boundaries justifies the deviations at issue here. Pet. at 20. Petitioners thus concede that the issue of whether Pennsylvania recognizes a desire to preserve county and municipal boundaries as a justification for population deviations in a redistricting plan is a question of State law.

What petitioners ignore, however, is that the Pennsylvania Supreme Court is fully competent to decide that Pennsylvania law favors preservation of counties and municipalities. Indeed, this Court has long recognized

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[10] Numerous courts have upheld plans with larger total maximum deviations than that at issue in this case as a result of one or more of these factors. *See, e.g., Turner* v. *Arkansas*, 784 F. Supp. 585, 588 (E.D. Ark. 1991) (0.73% deviation achieved the legitimate State objective of attempting, to the extent possible, to keep counties and voters in the same district to which they had been assigned under the prior redistricting plan); *Stone* v. *Hechler*, 782 F. Supp. 1116, 1126-27 (N.D. W. Va. 1992) (per curiam) (deviation of 0.09% served goals of preserving the cores of previous districts and maintaining district compactness; court reasoned that "the smaller the population deviation, the greater the importance of the State's interests, and the more consistently the plan as a whole reflects the State's interests, the smaller the State's burden of proof."); *Wilson* v. *Eu*, 1 Cal. 4th 707, 823 P.2d 545, 552, 4 Cal. Rptr. 2d 379 (1992) ("the need to form reasonably compact districts, to use census tracts rather than blocks in forming districts . . . and to comply with the Voting Rights Act" justified a maximum range in the congressional plan of 0.25%).

that "the courts of a State have the supreme power to interpret and declare the written and unwritten laws of the State." *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673, 680 (1930). It is therefore completely inappropriate for petitioners now to ask this Court to substitute its judgment for that of the Pennsylvania Supreme Court on this State law issue.[11]

Finally, petitioners try to suggest that the Pennsylvania Supreme Court wrongly applied to this case the standards for evaluating a legislatively enacted congressional plan instead of the supposedly more stringent standards for evaluating court-adopted congressional plans. Contrary to petitioners' argument, however, no such distinction exists. Both *Karcher*, 462 U.S. at 730 (reviewing a legislative plan), and *White* v. *Weiser*, 412 U.S. at 790 (reviewing a judicially adopted plan), permit only those population variances among congressional districts that "are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." Consequently, petitioners do not present any issue for this Court to review.[12]

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[11] Nothing in *Karcher* changes the rule that State Supreme Courts have the power to articulate State policy. The reference in *Karcher* to "legislative policies" as justifying deviations stems from the fact that the plan at issue there was a legislatively enacted one.

[12] Petitioners also complain that the goal of not splitting municipalities was not "consistently and uniformly applied" and that "while there were no municipal splits in western Pennsylvania, there were numerous municipal splits in eastern Pennsylvania." Pet. at 20-21. The reality is that there had to be some splits in the eastern part of the Commonwealth because it is more densely populated than the western part. Petitioners similarly argue that the Pennsylvania Supreme Court plan is inconsistent in regard to protecting communities of interest. Notwithstanding petitioners' claim, the Master found that the plan did a better job of respecting communities of interest than any other plan and petitioners never challenged this finding. App. at A44.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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APPENDIX

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APPENDIX

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 25 M.D. Misc. 92

ROBERT J. MELLOW, Senator, 22nd District, J. WILLIAM LINCOLN, Senator, 32nd District, LEONARD J. BODACK, Senator, 38th District, MICHAEL A. O'PAKE, Senator, 11th District, PATRICK J. STAPLETON, Senator, 41st District, JEANETTE F. REIBMAN, Senator, 18th District, VINCENT J. FUMO, Senator, 1st District, and H. CRAIG LEWIS, Senator, 6th District, individually and in their official capacities,

Plaintiffs,

vs.

BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, in their official capacities only,

Defendants.

STIPULATION

Pursuant to this Court's order of January 29, 1992, that provided, *inter alia*, that the parties should attempt to stipulate, to the extent possible, to the facts of this case, the Plaintiffs and the Defendants hereby stipulate as follows:

1. The Plaintiff Robert J. Mellow is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Tenth Congressional District of Pennsylvania. Plaintiff Mellow serves as the State Senator from the Twenty-second Sen-

atorial District and is the Democratic Leader of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

2. The Plaintiff J. William Lincoln is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Twenty-second Congressional District of Pennsylvania. Plaintiff Lincoln serves as the State Senator from the Thirty-second Senatorial District and is the Democratic Whip of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

3. The Plaintiff Leonard J. Bodack is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Fourteenth Congressional District of Pennsylvania. Plaintiff Bodack serves as the State Senator from the Thirty-eighth Senatorial District and is the Democratic Chairman of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

4. The Plaintiff Michael A. O'Pake is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Sixth Congressional District of Pennsylvania. Plaintiff O'Pake serves as the State Senator from the Eleventh Senatorial District and is the Democratic Causus Secretary of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

5. The Plaintiff Patrick J. Stapleton is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Fourth Congressional District of Pennsylvania. Plaintiff Stapleton serves as the State Senator from the Forty-first Senatorial District and is the Democratic Policy Committee Chairman of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

6. The Plaintiff Jeanette F. Reibman is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Fifteenth Congressional District of Pennsylvania. Plaintiff Reibman serves as the State Senator from the Eighteenth Senatorial District and is the Democratic Caucus Administrator of the Senate of Pennsylvania, and is bringing this action in her individual and official capacities.

7. The Plaintiff Vincent J. Fumo is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Frist Congressional District of Pennsylvania. Plaintiff Fumo serves as the State Senator from the First Senatorial District and is the Democratic Appropriations Chairman of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

8. The Plaintiff H. Craig Lewis is a citizen of the United States and the Commonwealth of Pennsylvania and a resident and a registered voter in the Eighth Congressional District of Pennsylvania. Plaintiff Lewis serves as the State Senator from the Sixth Senatorial District and is the Democratic Judiciary Committee Chairman of the Senate of Pennsylvania, and is bringing this action in his individual and official capacities.

9. The Defendant Brenda K. Mitchell is a citizen of the United States and the Commonwealth of Pennsylvania and presently serves as Acting Secretary of the Commonwealth Department of State. The Defendant William Boehm is a citizen of the United States and the Commonwealth of Pennsylvania and presently serves as the Commissioner of the Bureau of Commissioner, Elections and Legislation, Department of State. By virtue of 25 P.S. § 2621 (Purdon's 1991), Defendants Mitchell and Boehm have the responsibility for administering the elections for United States Congress and for delegates to national party conventions for Pennsylvania. They are sued in their official capacities only.

10. In 1982, the Pennsylvania General Assembly enacted Article XVIII-A of the Pennsylvania Election Code, 25 P.S. § 3571-3573 (Purdon's Supp. 1991), which provides, *inter alia*, that "[f]or the purpose of electing representatives of the people of Pennsylvania to serve in the House of Representatives in the Congress of the United States, this Commonwealth shall be divided into 23 districts . . ." *See* 25 P.S. § 3571. The statute also set forth the boundaries of each of the 23 districts and the census units included in each. The districts created by this statute were virtually equal in population, as provided by the 1980 Federal decennial census, at the time the General Assembly enacted this statute.

11. In 1990, the Bureau of the Census of the United States conducted the decennial census. The population of Pennsylvania, as determined by said census, is 11,881,643. On about December 31, 1990, the Clerk of the United States House of Representatives issued a Certificate of Entitlement entitling Pennsylvania to only 21 congressional representatives, a loss of two representatives. The United States Constitution requires the Commonwealth to re-draw its congressional districts on the basis of the 1990 federal census in time for the 1992 elections.

12. According to the 1990 census data, the "ideal" population of a congressional district (*i.e.*, the population that each congressional district would have if all the districts had equal numbers of people) is calculated by dividing the total number of people in the Commonwealth (11,881,643) by the number of congressional districts (21). For Pennsylvania, the ideal district would have 565,793 people.

13. Exhibit A to the Complaint in this suit shows the population (according to the 1990 census data) of each of the congressional districts created by 25 P.S. § 3571, the amount by which the population of each such district varies from the ideal population, and the percentage by

which the population of each such district varies from the ideal population. The data set forth on Exhibit A are accurate to the best of the parties' knowledge, information, and belief.

14. The data on Exhibit A demonstrate that almost all the districts created by 25 P.S. § 3571 are no longer equal in population and now vary widely from the ideal figure. The Fourteenth Congressional District, for example, has only 453,279 people, which is 19.88% less than the ideal. By contrast, the Sixteenth Congressional District has 587,048 people, which is 3.73% more than the ideal. Thus, the maximum deviation between these two districts is 23.64%.

15. The schedule prescribed by the Pennsylvania Election Code for the 1992 congressional elections in Pennsylvania established January 28, 1992, as the first day that candidates for Congress (or for district level delegates to the Democratic or Republican National Conventions) could circulate nomination petitions. 25 P.S. § 2868 (Purdon's Supp. 1991) ("No nomination petition shall be circulated prior to the thirteenth Tuesday before the primary"). The deadline for filing such nomination petitions is February 18, 1992. *Id.* § 2873(d) ("All nomination petitions shall be filed on or before the tenth Tuesday prior to the primary"). The primary election is presently scheduled for April 28, 1992, *id.* § 2753(a) ("primary shall be held on the fourth Tuesday of April"); and the general election for November 3, 1992, *id.* § 2751 ("general election shall be held biennially on the Tuesday next following the first Monday of November").

16. As of January 29, 1992, the General Assembly had not passed a new congressional redistricting plan. The House of Representatives, which has a Democratic majority, has passed a congressional redistricting bill. The Senate, which has a Republican majority, has not acted on this bill or passed a bill of its own.

17. The boundaries of congressional districts must be fixed substantially in advance of the primary election presently scheduled for April 28, 1992, in order for that election to take place in timely fashion. The reason is that the Secretary of the Commonwealth, the 67 county Boards of Election within the Commonwealth, and the candidates themselves must take numerous steps to prepare for the holding of an election, and these steps are dependent on congressional districts having been drawn.

18. To begin with, under the election schedule that is currently in force, the period for candidates to circulate petitions for nomination began on January 28, 1992. Without district boundaries having been drawn, a candidate cannot know if his or her political supporters will be included in the district he or she seeks to represent. The candidate cannot even know if the citizens who sign his or her nomination petition are actually residents of that district. Therefore, candidates cannot reasonably begin circulating such petitions until they know the boundaries of the districts in which they will be running.

19. Also on January 28, 1992, the Secretary of the Commonwealth must notify the county Boards of Election of the offices to be filled in the primary. Because congressional district lines have not yet been drawn, the Secretary of the Commonwealth had to send out a notice that omitted congressional representatives and district level delegates to the Democratic and Republican National conventions and explained why these offices were not included in the notice.

20. Candidates have three weeks to circulate nomination petitions and obtain the necessary signatures. The deadline for filing such petitions with the Secretary of the Commonwealth is February 18, 1992. Once this deadline has passed, parties have seven days to file objections or challenges to the nominating petitions. These objections and challenges are heard by the Commonwealth Court, which by statute has fifteen days from February

18 to decide them. In addition, any decision by the Commonwealth Court is appealable, within 10 days, to the Supreme Court, which has no statutory deadline for making decisions.

21. On or before March 9, 1992, the Secretary of the Commonwealth must transmit to county Boards of Elections the names of candidates who have filed nominating petitions and who have not withdrawn or been declared disqualified. The purpose of this transmission is to enable the 67 county boards to mail write-in absentee ballots to military voters who are stationed in remote locations (e.g., Saudi Arabia). State law requires county boards to mail these ballots to such military voters no later than March 9, 1992. In addition, county boards are required by March 14, 1992, to mail absentee write-in ballots to all other military voters.

22. Once the challenges to the nomination petitions have been resolved by the courts, the Secretary of the Commonwealth must certify the names of the candidates and the order in which they will appear on the ballot to each of the 67 county Boards of Elections. Although there is no statutory deadline, as a practical matter, the Secretary must certify no later than six weeks before the primary.

23. If the Secretary sends out the certification later than March 17, all counties will have difficulty printing ballots and sending out absentee ballots in time for the primary. Late certification would be a particular problem for those counties that are spit between two or more congressional districts. There are presently at least 18 counties that are split in this manner.

24. Those counties that are split between one or more congressional districts must then determine which ballots should be sent to each of the numerous polling places within the county. This can be a particularly time-consuming task in Philadelphia and Allegheny Counties, both of which are split among several congressional dis-

tricts. Further complications arise if precincts are split between congressional districts, as sometimes occurs.

25. The county Boards of Elections then must print ballots and/or labels for voting machines, a process that can take several weeks to complete. In Philadelphia County, voting machines must be programmed as well. The Boards of Election then send the ballots or labels to various polling places within each county for use on the day of the election.

26. The primary scheduled for April 28, 1992, is a "unified" primary; that is to say, primary elections will be held on that date for Presidential and State legislative candidates as well as for congressional candidates. If congressional district lines are not drawn in time for the April 28, 1992, primary, the Commonwealth will be faced with the choice of either holding a separate primary for candidates for Congress and district level delegate positions or postponing the entire primary to some later date.

27. The first choice would be extremely expensive: it would cost $5-6 million to hold a separate primary. Moreover, a separate primary could not be held until at least two months after the April 28 primary. Counties are given 20 days by statute to certify the primary election results. Moreover, any challenges to the result of the April 28, 1992, primary have typically taken several weeks to resolve, and during this period voting machines and ballot boxes would have to be locked up. After the challenges were resolved, new ballots must be printed and voting machines re-programmed. Thus, by the time the second primary was held, it would be too late to elect convention delegates because the Democratic National Convention is held in July.

28. Postponing the entire primary would also create substantial problems. The Commonwealth has chosen to have an April primary in order to increase the amount

of influence that Pennsylvania voters will have on the outcome of the Presidential nominations. Delaying the primary will obviously lessen the influence.

29. In sum, it is imperative that a congressional districting plan be enacted and signed into law by the Governor as soon as possible if the April 28, 1992, primary is to be held on schedule.

Date: January 30, 1992

Respectfully submitted,

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TRANSCRIPT OF MASTER'S HEARING, VOLUME 1 AT 17-22

* * * *

THE COURT: Have I missed any statewide plan in getting this introduction?

MR. KRILL: Yes, Your Honor. John Krill for Senator Loeper and his co-intervenors.

Your Honor, we did file a plan that was the plan passed by the State Senate. We have brought with us this morning a corrected plan and map that we would like to offer to the Court for its consideration.

THE COURT: It's late. In fact, you didn't have any plan in by the 11th, did you?

MR. MacNETT: We had a plan. We did not submit the maps that—

THE COURT: That's why counsel is filing it.

MR. MacNETT: There was a legal description filed with the Court with our intervention.

THE COURT: Before the 11th?

MR. MacNETT: Yes, on the 11th.

MR. KRILL: But not a map, Your Honor.

THE COURT: Okay. Frankly, this would be the only exception I would make. Again, recognizing that there is a party or partisan aspect of this, I just want to make sure all viewpoints are represented.

What is the maximum on that plan?

MR. MOORE: Your Honor, for clarification, are they giving us numbers on the plan they submitted, complying with the Court's order, or are they giving us the number on the new plan they are now attempting to submit?

MR. MacNETT: The numbers I would propose to offer the Court would be on the plan amendment that we—

MR. MOORE: The plan they are attempting to submit after the deadline.

MR. MacNETT: That's correct.

THE COURT: Is this a correction of the plan that you submitted on the 11th, or is it a new plan?

MR. MACNETT: It is essentially the plan that we filed on the 11th, with some very minor fine tuning.

THE COURT: I'm being very liberal on this. Go ahead.

MR MOORE: Just for the record, we would object.

THE COURT: I will overrule that objection.

MR. MACNETT: The maximum amount of deviation in terms of gross population is 28 above and 26 below, for a range of 54.

THE COURT: By 54, I take it you mean .54 percent?

MR. MACNETT: I'm talking about individuals. We are dealing with raw numbers.

THE COURT: 54 persons.

MR. MACNETT: That's correct. The average deviation per person in the plan is 12.6 percent. I'm sorry. It's 12.6 persons.

THE COURT: The maximum is 54 and the average is 12.6.

MR. MACNETT: The range, Your Honor, is 54. The maximum from one direction is 28.

THE COURT: That's what we are defining maximum as.

MR. MACNETT: Right. I haven't reduced those to percentages. Obviously they are very, very tight, and we will submit those.

THE COURT: All you would do for the maximum, put 54 over the ideal.

MR. MACNETT: That's right. It's about one ten-thousandths.

THE COURT: Okay. Thank you.

MR. PACKMAN: Your Honor, just by way of comparison, just for the Court's edification, our proposed Plan 2 has a maximum deviation of 63 people, which calculates to .01 percent. So if they are at 54, I imagine they are at about .01 percent as well, just for the Court's information.

MR. MOORE: Your Honor, again by way of clarification. In our plans we computed the average devia-

tions: On Plan A, that average deviation is .0026 percent. On Plan B it is .0027 percent.

THE COURT: Give me that again. Average on Plan A is what?

MR. MOORE: Is .0026 percent. Plan B it is .0027 percent.

THE COURT: These are the Speaker's plans.

MR. MOORE: Correct.

MR. MURPHY: Your Honor, excuse me. Representative Ryan has a statewide plan that he's submitted also.

THE COURT: When was that submitted.

MR. MURPHY: Yesterday, Your Honor.

MR. HARVEY: That's the late one, Your Honor.

MR. MURPHY: Representative Ryan wanted to be able to present his plan to the Legislature before he presented it to the Court, and because of the lateness of the time the House of Representatives took up the reapportionment plan on the 11th, there was no opportunity to ask to intervene prior to yesterday.

MR. MOORE: Your Honor, the matter has already been determined by the Court. I asked that question on clarification. The Court advised that Mr. Ryan had intervened in time, had not submitted a plan, and the plan could not be submitted.

MR. PACKMAN: We would concur with that position, Your Honor.

THE COURT: There seems really no reason for the plan.

MR. MURPHY: We submitted a plan with our motion to intervene.

THE COURT: But after the 11th.

MR. MURPHY: Yes, sir.

THE COURT: I'm being liberal in allowing intervention, but I can't go along with adding that plan. Our order was plain to read. Just make life tough for this Court. I will sustain the motion excluding that plan.

You will be accorded the opportunity to support other plans or to cross-examine.

* * * *

TRANSCRIPT OF MASTER'S HEARING, VOLUME 2B AT 92-93

* * * *

Q [by Mr. Krill, petitioners' counsel] In the course of drafting your plan [the Loeper Plan], did you consult with Congressman Blackwell or with any of his staff?

A At one point, a gentleman's name I believe is Jim Davis, from Congressman Blackwell's staff, sat next to me one morning and we drew a second and a first congressional district that would appease Congressman Blackwell, and also one which they thought could garner support of enough members of the black caucus in the House of Representatives to pass House Bill 541 as an amendment.

* * * *

TRANSCRIPT OF MASTER'S HEARING, VOLUME 3 AT 25-34

* * * *

BY MR. MOORE:

Q Let's take District No. 1 [of the Loeper Plans]. Is the original population total for that district, is the population total for that district in the original plan 565,806?

THE COURT: Let me suggest, Mr. Moore, don't read every number to him. Tell him the districts you want and ask him for the numbers.

BY MR. MOORE:

Q What is the number you have for the first district in the amended plan?

A 565,820.

Q Is that not a net difference in the first district of 14 votes? I'm sorry. 14 people.

A May I qualify that?

Q I think you answered my question.

THE COURT: I think he's entitled to explain.

A As testimony yesterday indicated, the first and second districts were changed substantially. Only substantially for the minority populations. So of course that answer is going to be there are different changes in each of those districts.

BY MR. MOORE:

Q When you say changed substantially, do you mean a figure in the first district of something like 163,926 people?

A I mean a percentage that goes from 68-and-a-half percent black down to 65.8 percent black is what I mean.

Q Did you not in fact change the population total between the number of people removed and the number of people added in the first district for a total of 163,926 people?

A If that number is accurate, I will agree to it.

Q I'm not sure what that answer means.

THE COURT: I'm not sure what your question means. Now I will have to ask you to state the first population figure you stated for the original District 1.

MR. MOORE: Your Honor, we have been dealing with maximum deviation ranges which demonstrate the number of people below the ideal and number of people above. This figure 163,926 represents the number of people they moved out of the district plus the number of people they moved back into the district, for the total range, total change in that district. The total shift in population in that district.

THE COURT: What was the first population figure you stated that I asked you to not state again, 565 something for the original plan District 1? What was the figure.

MR. MOORE: 565,806. That was the population total in the first district in the original Loeper plan. The population total for the first district in the amended plan is 565,820. That shows a net difference of 14 people. However, when they moved from the original plan to the amended plan, they moved a total of 163,926 people.

THE COURT: Okay. Now I understand.

BY MR. MOORE:

Q Let's go to the second district.

MR. MOORE: I'm sorry. I forgot the manner in which Your Honor wants these asked. I'm asking him for the number.

THE COURT: Don't you repeat the numbers. Ask him for the numbers.

BY MR. MOORE:

What's the number there, sir, in the original plan?

A For?

Q Second district.

A 566,071.

Q What's the number in the amended plan for that district?

A 565,783.

Q Is that not a net difference reduction of 288 people?

A No. It's 270 people, I believe. I'm sorry. You are correct. It goes to a minus 9th deviation, that is correct.

Q Arriving at those numbers, did you not move, have a total population shift, of 153,196 people in the second district?

A If adding the 48th ward to the first district, the 29th ward, the 28th ward, the 11th ward and the 10th and 50th wards add up to that, I will agree to that.

Q Let's go to the third district. What is the population total for the third district in the original Loeper plan?

A 565,758.

Q In the amended plan?

A 565,782.

Q For a net difference, an increase of 24 people, correct?

A That is correct.

Q Arriving at that number, did you not shift the total population by 15,776 people in that district?

A If making the 18th ward whole in the third district and taking a couple additional precincts out of the 61st district and exchanging a precinct between the 3rd and 8th equal that, I will agree to that.

Q Let's go to the 4th district. What is the population total for the 4th district in the original plan?

A 565,695.

Q In the amended plan?

A 565,769.

Q For a net increase of 74 people, is that correct?

A Yes.

Q In the 4th district to arrive at that change, did you not move, have a total population shift in and out, of 19,974 people for that district?

A If those numbers are accurate, I did.

Q That district, by the way, is the Colter/Murphy district under your proposed plan, is that correct?

A That is this district on the Ohio border?

Q Yes.

A Yes.

Q Is your answer yes?

A If you are referring to this district on the Ohio border, the 4th, yes.

Q Let's go to the 5th district. What's your population total in the original plan for the 5th district?

A If I may for a second, I think we could speed this up, ask counsel if he has a sheet that has all of the districts and their population for one through 21 in the original plan.

MR. KRILL: No.

A The number is 565,888.

BY MR. MOORE:

Q And in the amended plan?

A 565,775.

Q For a net decrease of 113 people, correct?

A Correct.

Q Let's jump around a bit. I wanted to go through every one, but we will save a little time. Let's go to the 7th district.

What is your original population total in the first [sic] district?

A 565,481.

Q In the amended plan?

A 565,787.

Q For a net increase of 306 people?

A That is correct.

Q Let's go to 8. What's your population total in the original plan in the 8th district?

A 566,027.

Q And in the amended plan what is that figure?

A 565,772.

Q Is there not a net decrease of 255 people?

A Yes.

Q Let's jump to the 10th district. The 10th district, what is the population total for the original plan in that district?

A 566,199.

Q In the amended plan?

A 565,797.

Q For a net decrease of 402 people, is that correct?

A If that's the population of Shrewsbury Township in Lycoming County, that is correct.

MR. MOORE: I can continue through the list, Your Honor, but I will let the submission I think which they have made—I think the point's been made that the amended plan was a little bit more than that.

THE COURT: Were there any other districts that you want to highlight as involving a substantial shift?

MR. MOORE: Your Honor, we had a chance to compute the net population changes in the brief period of time we had. We cannot do that for every district. We could clearly do that very easily in Philadelphia. I can give you nets for every district, if you would like that, but in the interest of time—

THE COURT: I see.

MR. MURPHY: I do have two others we can touch upon.

BY MR. MOORE:

Q Let's go back to the 8th. In the 8th district we ended up with a net population decrease of 255 people, correct?

A Correct.

Q In arriving at that number in the 8th district, did you not shift 16,233 people? That would be in the Costmyer district.

A If by shifting a precinct in Bensalem from the 8th to the 3rd and two townships in Montgomery County out of the 8th to the 13th and taking another precinct from an already broken municipal, if that equals that population, that's correct.

Q In the 18th district what was the population total in your original plan?

A 565,444.

Q In the amended plan?

A 565,773.

Q For a net increase of 315 people. Did you not shift a—

A 315? No. Yes.

Q Thank you. I will try not to move so quickly, so you get a chance to answer.

Was the net shift in that case not 3,105 people?

A If that equals the loss of East Deer and the addition of two precincts in Kennedy Township, I believe that would be correct.

Q As I indicated, we didn't have a chance to compute all of the population totals, but just based upon the net shift that I have provided, does that not indicate that in moving from the Loeper plan as originally filed to the attempted amendment, did you not move something in excess of 372,210 people?

A I can't answer that question because I did not do an analysis between the two plans.

Q Would you like to have a chance to total the net total to determine that they do in fact equal 372,210, the figures you have already indicated or already agreed to as the total population shifts?

MR. KRILL: Your Honor, I'm going to object to that question as stating a fact that's not in evidence.

THE COURT: Yes, he did not specifically agree to the figures. He said I accept your arithmetic if it consists of specific geographical exchanges. I think it's not quite fair he had accepted the figures.

But your point is that if the shifts you have mentioned are added up, they total what, Mr. Moore?

MR. MOORE: They total 372,210.

THE COURT: That can be checked. I'm sure your arithmetic is okay.

BY MR. MOORE:

Q Again consulting the information you have available, will you please give us the range of high to low population in terms of raw numbers, number of people, in the original Loeper plan?

A I don't believe I have that. This will take some time. Unless counsel has it handy.

Q With the Court's indulgence, I think it's worth taking that time.

THE COURT: If they have percentages, it can be readily computed, because the base number, 565,793, remains the same.

BY MR. MOORE:

Q Do you have a number on the absolute overall range in terms of number of people in the original plan?

A Without going through district by district and writing down the lowest and highest, I couldn't tell you that, and that will take about ten minutes.

TRANSCRIPT OF MASTER'S HEARING, VOLUME 3 AT 138-39

* * * *

MR. MOORE: I would like to reinstate my objection to the admission of each of those documents. The testimony we have heard indicates there have been total population shifts between the first plan and second plan somewhere in excess of 327,000 people just in the districts we were able to quickly identify. A review of each of the population totals for the districts in that plan shows in every single district there are net population changes. Some districts they are as high as 300 people, one district it's as high as 400, and many of the districts it's in the hundreds. This is a different plan.

We have been told that the first plan was prepared in an effort to get some bipartisan support. In spite of the proponent's technical witness on this point, it is clear this plan would constitute a major shift in the political delegation. Currently there is a one vote republican edge in a 23-member delegation. We are going to lose two seats, we are going to a smaller delegation.

THE COURT: Are you now talking about Loeper 1 or Loeper amended? Original Loeper or amended Loeper?

MR. MOORE: The one vote edge is a current situation, it's our current delegation with 23 members. We are going down to 21, we are losing two, which is bad enough. Under the amended Loeper version, it is a likely possibility that there will be a three vote republican edge. That in itself is a significant change. On top of that is the fact that the delegation will change from 23 members to 21. That makes the impact of that three vote edge that much more significant. It cannot be argued that these are the same plans. This is a different plan.

THE COURT: I agree.

MR. MOORE: This is a second plan. But on top of that, it is a second plan which was not timely submitted.

THE COURT: I agree.

MR. MOORE: You are agreeing with me. I am on the record against the admission of untimely submitted plans. And in opposition to each one of those amendments.

* * * *

EXCERPTS FROM BRIEF FOR INTERVENORS,
F. JOSEPH LOEPER, ROBERT C. JUBELIRER,
D. MICHAEL FISHER, CHARLES LEMMOND,
HANK SALVATORE, NOAH WENGER
Dated February 21, 1992 at 33, 36

* * * *

e. The Loeper Plans correct a judicially recognized gerrymander, while the O'Donnell and McDade/Murtha Plans create gerrymandered districts.

The simple fact that Pennsylvania will have two less Congressmen after the redistricting necessitates some impact [on] existing congressional districts and incumbent congressmen.

* * * *

Both Loeper Plans merge portions of the 4th District with portions of the 22nd District. (Transcript, Vol. 2-B at 112). This merger corrects the gerrymander created by the current 4th District. (Transcript, Vol. 2-B at 112-13).

* * * *

[Appendix F]

PLAINTIFFS' PROPOSED PLAN 2

LEGISLATIVE DATA PROCESSING CENTER
PENNSYLVANIA PLACE MAP DISTRICT LISTING

Congressional District

District	1990 Adj Population Total	1990 Adj 18+/Race Total	White	Black	1990 Adj NHis 18+ White	Black	Am Ind	Rep	1990 Fall Reg Dem	Oth
C001	565,895	412,599	173,232	205,127	167,195	201,960	835	72,587	224,816	7,875
C002	565,815	439,169	169,542	256,269	167,023	254,637	1,123	51,137	252,273	10,744
C003	565,775	437,163	395,705	19,717	387,988	18,776	588	141,747	166,541	6,279

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE

Cert. No. 92-4401

OFFICE OF THE SECRETARY OF THE COMMONWEALTH

Harrisburg, July 9, 1992

PENNSYLVANIA, ss:

I, Brenda K. Mitchell, DPA, *Secretary of the Commonwealth of Pennsylvania,*

DO HEREBY CERTIFY, That the attached is a true and correct copy of page 6 and page 27 of the April 28, 1992 Primary ballot certification report from Philadelphia County, Pennsylvania, as the same appears of record and remains on file in this office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the Seal of my Office to be affixed, the day and year above written.

BRENDA K. MITCHELL
Secretary of the Commonwealth

BUREAU OF ELECTIONS
1992 PRIMARY BALLOT CERTIFICATION REPORT
APRIL 28, 1992.

Philadelphia County (51)

Ballot Position and Election Result Section Part I

Office Positions Shall Appear on Voting Machine or Paper Ballot in Same Order as Listed

* * Democratic Primary * *				Insert Vote In Words:	Insert Vote In Digits:
Representative In Congress Vote for One				District 001	
Thomas M. Foglietta PO Box 40078 Philadelphia	19106-0000	County: Munic:	Philadelphia Ward 5 Div 3	Forty Five Thousand Fifty Eight	45,058
Representative In Congress Vote for One				District 002	
C. Delores Tucker 6700 Lincoln Dr. Philadelphia	19119-0000	County: Munic:	Philadelphia Ward 22, Div 5	Forty Thousand Thirty Three	40,033
Lucien E. Blackwell 235 S Melville St Philadelphia	19139-0000	County: Munic:	Philadelphia Ward 46	Forty Seven Thousand One Hundred Sixty Nine	47,169
Representative In Congress Vote for One				District 003	
Robert A. Borski PO Box 26846 Philadelphia	19134-0000	County: Munic:	Philadelphia Ward 65	Forty Nine Thousand Two Hundred Sixty Seven	49,267

BUREAU OF ELECTIONS
1992 PRIMARY BALLOT CERTIFICATION REPORT
APRIL 28, 1992.

Philadelphia County (51)

Ballot Position and Election Result Section Part I

Office Positions Shall Appear on Voting Machine or Paper Ballot In Same Order as Listed

* * Republican Primary * *

				Insert Vote In Words:	Insert Vote In Digits:
Representative In Congress				District 001	
Vote for One					
Craig Snyder P.O. Box 1944 Philadelphia	19105-0000	County: Munic:	Philadelphia Ward 5 Div 17	Five Thousand Six Hundred Sixteen	5,616
Representative In Congress				District 002	
Vote for One					
Larry Hollin 2036 Arch St Philadelphia	19103-0000	County: Munic:	Philadelphia Ward 8 Div 29	Seven Thousand Nine Hundred Ninety Nine	7,999
Representative In Congress				District 003	
Vote for One					
Charles F. Dougherty 2475 Grant Ave Philadelphia	19114-0000	County: Munic:	Philadelphia Ward 53 Div 17	Thirty One Thousand Six Hundred Fourteen	31,614

Supreme Court, U.S.
FILED
SEP 16 1992
OFFICE OF THE CLERK

(4)

No. 91-2015

In The
Supreme Court of the United States
October Term, 1991

F. JOSEPH LOEPER, ROBERT C. JUBELIRER, D. MICHAEL FISHER, CHARLES LEMMOND, HANK SALVATORE, NOAH WENGER, and MATTHEW RYAN,
Petitioners,

v.

BRENDA K. MITCHELL, Secretary of the Commonwealth, and WILLIAM BOEHM, Commissioner of the Bureau of Commissions, Elections, and Legislation, Department of State, et al.,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

REPLY BRIEF

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

INTRODUCTION

This case presents important questions about the role of a state supreme court in promulgating a congressional redistricting plan. The Petition challenges the adequacy of the state court's procedure and the state court's departure from standards used by the federal courts for the protection of constitutional and statutory rights of the voting public. Most of what Respondents said in their Brief in Opposition has no bearing on whether the questions presented by Petitioners are worthy of *certiorari*. Respondents largely defend the decision of the Supreme Court of Pennsylvania on the merits. Petitioners will address these substantive arguments should *certiorari* be granted.

This reply addresses only Respondents' contentions relevant to whether this Court should grant a writ of *certiorari*. Those contentions are (1) that no conflicts exist, (2) that the Pennsylvania Supreme Court can create common law policy, as it does in questions of state law, to justify population deviations higher than practicable among congressional districts, and (3) that two of the issues raised were waived by Petitioners for failure to raise them in the state court proceedings.

RESPONSE

I. CONFLICTS.

The Pennsylvania Supreme Court's decision is in conflict with other state court decisions, federal court decisions and this Court's decisions. In statewide reapportionment generally, whether done by a three-judge federal court or a state court, the important supervisory role played by the federal circuit courts is absent,

making a consistent body of case law unlikely to emerge on a regional basis, much less on the national level, unless this Court liberally exercises its power of review. The conflict of the Pennsylvania Supreme Court's decision with both federal and other state courts illustrates this need.

A. THE PENNSYLVANIA SUPREME COURT'S PROCEDURE IS IN CONFLICT WITH THAT USED BY FEDERAL COURTS AND OTHER STATE COURTS.

The Petition details the truncated and expedited proceedings that took place in the state court in this case. The court considered only plans submitted in a two week period between the filing of a complaint and the start of its three days of hearings. See Petition at 2-3, 7. The court declined to consider refining any of these plans or developing a court plan that more closely met the "one man, one vote" standard while fulfilling other federal constitutional, statutory and case law requirements.

This manner of proceeding is in sharp contrast to, and conflicts with, the careful consideration of all constitutional, statutory and case law requirements, as well as concern for the public, demonstrated by the California and Texas Supreme Courts and the three-judge district court panel in Illinois. See *Wilson v. Eu ("Wilson I")*, 816 P.2d 1306 (Cal. 1991); *Wilson v. Eu ("Wilson II")*, 823 P.2d 545 (Cal. 1992); *Terrazas v. Ramirez*, 829 S.W.2d 712 (Tex. 1991); and *Hastert v. State Board of Elections*, 777 F. Supp. 634 (N.D. Ill. 1991). It is even in conflict with this Court's decision in *Brinkerhoff-Faris Trust Savings Co. v. Hill*, 281 U.S. 673, 681 (1930), a case cited by Respondents, which held that state courts, even when determining state law, must "accord the parties due process of law."

Respondents, rather than addressing the conflicts, focus solely on justifying the Pennsylvania Supreme Court's exclusion of certain congressional redistricting plans from consideration because

they were submitted after the court's self-imposed twelve day deadline for filing proposed plans, by non-parties who intervened after the deadline was announced. This argument goes to the merits and not to the *certiorari*-worthiness of the questions presented by the Petition.

Petitioners request this court to resolve the conflict between the process used by the Pennsylvania Supreme Court in adopting a reapportionment plan and that used by other courts, which have recognized a full and fair hearing opportunity must be provided that protects the rights of the public as well as those of the litigants.

B. THE PENNSYLVANIA SUPREME COURT'S FAILURE TO OBTAIN SUFFICIENT INFORMATION TO ENSURE THAT THE PLAN IT ADOPTED COMPLIES WITH THE VOTING RIGHTS ACT CONFLICTS WITH THE STANDARD APPLIED BY OTHER STATE AND FEDERAL COURTS.

1. The Pennsylvania Supreme Court's Decision Conflicts with an Ohio Three-Judge District Court Decision on when Minority-in-the-Majority Districts Should be Created.

Respondents claim the Pennsylvania Supreme Court's decision does not conflict with the decision of the three-judge panel in *Quilter v. Voinovich*, No. 91CV-2219 (N.D. Ohio filed January 31, 1992), *probable jurisdiction noted*, 112 S.Ct. 2299 (1992). This is wrong; there is a conflict. In *Quilter* the panel held that neither the Voting Rights Act nor case law mandates the creation of minority-in-the-majority districts wherever possible and that there must be a finding, supported by the evidence, of a violation of the Voting Rights Act before there is justification for the creation of new minority-in-the-majority districts. In contrast, the Pennsylvania Supreme Court adopted the Master's Recommended Decision that "[w]hen possible, an increase in the number of

minority-in-the-majority districts is constitutionally required." Petition App. at A15, A34.

2. The Pennsylvania Supreme Court's Decision Conflicts with the California Supreme Court's Decision on the Creation of Minority Influence Districts.

There is a conflict between the standard used by the Pennsylvania Supreme Court on the issue of the creation of minority influence districts when adopting a congressional redistricting plan and that employed by the California Supreme Court. The California Supreme Court in *Wilson v. Eu*, 823 P.2d 545 (Cal. 1992), recognizing that there was a dispute among the circuits on whether a Voting Rights Act challenge could be brought with respect to minority influence districts, drew and adopted a plan that protected minority influence districts. The California Court accepted the responsibility for obtaining sufficient information to ensure that the plan it adopted was consistent with constitutional, statutory and case law requirements. The Pennsylvania Supreme Court, in contrast, rejected Petitioners' exception to the Master's failure to make affirmative findings that the reduction of the African-American population in the Fourteenth Congressional District would be harmless to those minority voters. Petition App. at A13.

II. THIS COURT SHOULD DECIDE WHETHER STATE COURTS MUST USE THE SAME STANDARD IN ADOPTING CONGRESSIONAL REAPPORTIONMENT PLANS AS THE FEDERAL COURTS.

State courts have become increasingly active in the reapportionment arena. In addition to the instant case, this court has, or had, before it, cases involving state court adopted plans, at a minimum, from Minnesota and New York. Nationwide, since the release of the 1990 census, state courts have been involved one way or another in congressional and/or state legislative

reapportionment in, at least, Alaska, California, Florida, Idaho, Minnesota, New Jersey, New York, Ohio, Pennsylvania, and Texas. In many of these states, concurrent litigation was ongoing in the federal district courts. There are few such cases associated with past decennial reapportionments but the large number resulting from the 1990 reapportionment portends more in the future. As when addressing constitutional challenges, state courts adopting statewide redistricting plans should be held to the same standard as federal courts in order to avoid non-uniformity in federal law. See *McKesson Corporation v. Division Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990).[1]

This Court has held that when a federal district court adopts a reapportionment plan, it cannot ignore state reapportionment policy. *White v. Weiser*, 412 U.S. 783 (1973). The federal constitution, absent congressional action, leaves reapportionment to the state legislatures. U.S. Const. art. I, §2, cl. 1. In this case, the Pennsylvania Supreme Court ignored the policies contained in the previously enacted legislative plan. A federal court could not have done so.

Respondents in their brief justified the Pennsylvania Supreme Court's action by noting, correctly, that this Court has recognized that a state's highest court has the power to declare state law. This Court, however, has never decided that a state supreme court, acting in a purely judicial capacity as a court with concurrent jurisdiction over federal "one-man, one-vote" questions, can invent

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[1] In *McKesson Corporation*, 496 U.S. at 28-29, this Court explained that concurrent jurisdiction over issues of federal law is subject to its review in order to "secure state-court compliance with, and national uniformity of federal law[.]" Moreover, when addressing a federal constitutional challenge, a state court should apply the standard of review that this Court has imposed. See *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981) ("[W]hen a state court reviews state legislation challenged as violative of the Fourteenth Amendment, it is not free to impose greater restrictions as a matter of federal constitutional law than this Court has imposed.").

state policy considerations to justify departing from strict equality.[2] If that is what the Pennsylvania Supreme Court did, it would be a significant difference between state and federal courts because no federal court could invent policy for a state that would justify such a departure.[3] In a related case referenced in the Petition, *Nerch v. Mitchell*, No. 3:CV-92-0095 (M.D. Pa. filed August 13, 1992), a three-judge federal panel has recently held that that is precisely what the Pennsylvania Supreme Court did. Reply App. at A5-A57. The panel held that the Pennsylvania Supreme Court's declaration of public policy was "the functional equivalent of a similar legislative or constitutional declaration." Reply App. at A30.

If a state court is not bound to consider the policies contained in prior legislative enactments in redistricting cases, but federal courts are, the outcome of any redistricting lawsuit is likely to be very different depending on the forum selected by the plaintiffs. This will encourage litigation and discourage parties from seeking legislative solutions to redistricting issues. It will reward the party who strikes first with a lawsuit in the forum perceived to be most advantageous and, in the event of parallel state and federal proceedings, who can get his or her preferred forum to beat the other court to entry of judgment. This is an issue affecting federal rights of all citizens that ought to be addressed by this Court now.

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[2] A state, of course, may "allocate the lawmaking function to whatever branch of state government [it] may choose." *Minnesota v. Clover Leaf Creamery, Co.*, 449 U.S. at 461 n.6. See also, *Smiley v. Holm*, 285 U.S. 355 (1932). Pennsylvania, however, has not included the Pennsylvania Supreme Court in the lawmaking function for congressional reapportionment. Pennsylvania's Constitution, unlike, for example, that of California, does not even address congressional reapportionment.

[3] Even if the Pennsylvania Supreme Court did not do this, but merely assumed that the possible justifications noted by this Court in *Karcher v. Daggett*, 462 U.S. 725 (1983), were *per se* sufficient justifications, it would be an egregious error deserving review.

III. ALL QUESTIONS RAISED BY PETITIONERS ARE PROPERLY BEFORE THIS COURT.

Respondents allege that Petitioners waived two points made in the Petition because Petitioners failed to raise these issues in the state court proceedings. The points are (1) the portion of Petitioners' second reason for granting a writ based on the Pennsylvania Supreme Court's justification of the creation of a second minority-in-the-majority district and (2) Petitioners' third reason for granting a writ based on the Pennsylvania Supreme Court's failure to defer to the policies reflected in the last legislatively enacted plan.

The nature of the state court proceeding was such that it was not necessary for Petitioners to raise these points prior to the Petition to this court. The order of the Pennsylvania Supreme Court and its opinion in support thereof were the first court decision in this case, making the Petition the first opportunity to frame issues of error. The Pennsylvania Supreme Court addressed all the federal issues raised by Petitioners in their Petition. As this Court has recognized, "[a] ruling on the merits of a federal question by the highest state court leaves the federal question open to review in [the United States Supreme Court]." *Franks v. Delaware*, 438 U.S. 154, 161-62 (1978).

In any event, Petitioners did anticipate and bring these points to the state court's attention during the proceedings. With respect to the creation of a second minority-in-the-majority district, Petitioners excepted to the Master's recommended plan. Petition App. at 157-58. Moveover, Loeper Petitioners in Paragraph 2 of their Supplemental Exceptions to the Master's Report requested the Pennsylvania Supreme Court to remand the matter to the Master for further proceedings in which he would permit submission, amendment, and correction of errors in refinement of statewide plans and develop a record that would demonstrate that the plan adopted would protect federal constitutional and statutory rights, including rights to equal representation and minority voting rights. Reply App. at A3-A4.

Respondents are simply wrong in alleging that Petitioners never raised their third reason for granting the Petition, failure of the state court to follow *White v. Weiser*, in the state court proceedings. Petitioner Ryan raised this issue in the Memorandum of Intervenors Ryan and Cornell filed with the court subsequent to the hearings. Reply App. at A1-A2. It is also implicit in Exception No. 7 of the Exceptions of Intervenors Loeper, et al., Petition App. at A156, and it was explicitly raised by counsel for Petitioners during oral argument before the Pennsylvania Supreme Court.[4]

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[4] In accordance with normal practice, no record was made of the oral argument held March 7, 1992.

CONCLUSION

For the reasons set forth in the Petition and in this Reply, Petitioners respectfully request that the Petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

IN THE SUPREME COURT OF PENNSYLVANIA

ROBERT J. MELLOW, Senator, 22nd District, et al.,	:	No. 7 M.D. Misc. Dkt. 1992
Petitioners,	:	[25 M.D. 1992]
v.	:	
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, et al.,	:	
Respondents.	:	

MEMORANDUM OF INTERVENORS RYAN AND CORNELL

. . . .

The U.S. Supreme Court in *White v. Weiser*, 412 U.S. 783, 795 (1973) stated clearly that state legislative policy should be adhered to by Federal Courts when acting on Congressional Plans. The Court said in relevant part:

> Just as a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution, we hold that a district court should similarly honor state policies in the context of congressional reapportionment.

This Court is respectfully encouraged to adopt the concepts embodied in the Original Loeper Plan as its own expression of the best state policy for Congressional Reapportionment and to use the revisions made thereto by the Loeper Revised Plan to more closely conform it to the principle of one man one vote.

IN THE SUPREME COURT OF PENNSYLVANIA

ROBERT J. MELLOW, Senator, 22nd District, et al.,	:	
	:	No. 7 M.D. Misc. 92
Plaintiffs	:	
v.	:	
BRENDA K. MITCHELL, Acting Secretary of the Commonwealth, et al.,	:	
Defendants	:	

SUPPLEMENTAL EXCEPTIONS OF INTERVENORS LOEPER, JUBELIRER, FISHER, LEMMOND, SALVATORE AND WENGER TO THE REPORT AND RECOMMENDATION OF THE MASTER

Intervenors F. Joseph Loeper, Robert C. Jubelirer, D. Michael Fisher, Charles Lemmond, Hank Salvatore and Noah Wenger, by their attorneys, hereby file the following supplemental exceptions to the findings, recommended decision and form of order of this Court's Master, Honorable David W. Craig, filed on February 24, 1991:

1. Intervenors filed exceptions in this matter on February 26, 1992. In their exceptions, Intervenors requested two alternatives for relief: (1) the adoption of the Loeper Amended Plan and (2) alternatively, that the court should design a plan of its own that addresses the failures of the plan recommended by the Master.

2. Intervenors desire to modify their prayer for relief to provide for another alternative, namely remand to the Master for further proceedings.

WHEREFORE, Intervenors respectfully request that the Court

(a) adopt the Loeper Amended Plan,

(b) design a plan of its own that satisfies all requirements of law, or

(c) remand this matter to the Master for further proceedings including

> (i) the submission, amendment correction, of errors and refinement of state-wide plans for congressional redistricting and
>
> (ii) providing the Court with sufficient data, in the record, to demonstrate affirmatively that any plan under consideration will protect federal constitutional and statutory rights, including rights to equal representation and minority voting rights.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHESTER NERCH, HERBERT BARNES, CLARENCE THOMPSON, JOSE HERNANDEZ, MATTHEW RYAN, F. JOSEPH LOEPER, D. MICHAEL FISHER, MICHELLE AGATSTON, LUIS CRUZ and LAWRENCE R. WATSON, II,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 3:CV-92-0095
BRENDA K. MITCHELL, Secretary of the Commonwealth of Pennsylvania, and WILLIAM BOEHM, as Commissioner of the Bureau of Commissions, Elections and Legislation, Department of State of the Commonwealth of Pennsylvania,	:	
Defendants.	:	

BEFORE: STAPLETON, *Circuit Judge*, and RAMBO and POLLAK, *District Judges*

OPINION OF THE COURT

PER CURIAM:

This case presents a challenge to the plan for congressional redistricting adopted by the Pennsylvania Supreme Court on March 10 of this year. That plan is now in force and will, unless found deficient by this court, constitute the basis for the elections to be held in November of this year, and every second November thereafter in this decade, for Pennsylvania's delegation to the United States House of Representatives. The challenge to the plan is dual: plaintiffs contend that the population discrepancies among certain of the newly delineated districts offend the constitutional principles of equality embodied in the "one-person one-vote" doctrine. Further, plaintiffs contend that the redrawn second congressional district, in Philadelphia, and fourteenth congressional district in Allegheny County (Pittsburgh and environs), will operate to reduce the voting strength of African-Americans in those districts in a manner that contravenes Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the fifteenth amendment to the United States Constitution.

I.

Throughout the 1980s, the Pennsylvania delegation in the United States House of Representatives numbered twenty-three. But, towards the end of the decade, the political truth began to sink in that twenty-three was a high-water mark from which Pennsylvania would, in the 1990s, recede. It was clear that the population of the northeastern states was becoming a progressively smaller fraction of the national population--diminishing relative to the growing populations of the south and west—and hence Pennsylvania (and New York and other large northeastern states) would lose representation in the House. The precise degree of that loss would turn on the population figures officially declared by the 1990 decennial census. The census, formally ratifying the massive demographic shifts that had been in progress for a number of years,

would dictate the apportionment of House seats among the fifty states during the last decade of the century.

On December 31, 1991, the Clerk of the House of Representatives advised the Secretary of the Commonwealth of Pennsylvania that, beginning with the 1992 elections, Pennsylvania would be entitled to only twenty-one seats in the House. And so it fell to the Pennsylvania General Assembly to perform its constitutional responsibility to redraw the congressional map of Pennsylvania, providing for twenty-one rather than twenty-three districts. Four weeks passed. The General Assembly—the Democratic-controlled House and the Republican-controlled Senate—dithered and did nothing.

On January 28, 1992—the first day on which nominating petitions could be circulated for the April 28 primary elections—eight Democratic state senators, led by Senator Robert J. Mellow, filed suit in the Pennsylvania Commonwealth Court. The suit asked that the existing regime of twenty-three congressional districts be declared unconstitutional and that, in default of General Assembly adoption of a proper twenty-one district regime, the court promulgate a valid plan. Concurrently, the Mellow plaintiffs moved the Pennsylvania Supreme Court to take jurisdiction of the case. The named defendants were Acting Secretary of the Commonwealth Brenda K. Mitchell and Commissioner William Boehm of the Commonwealth's Bureau of Commissions, Elections and Legislation.

The following day, two suits similar to the Mellow suit were filed in federal district courts seeking judicial invalidation of the existing twenty-three district regime and, in default of action by the General Assembly, judicial promulgation of a valid twenty-one district plan. One of the suits was brought in the Middle District of Pennsylvania, by Chester Nerch, Treasurer of the Lackawanna County Democratic Committee. The other suit was brought in the Eastern District of Pennsylvania by three plaintiffs: Herbert Barness, a voter in the eighth congressional district; Clarence Thompson, an African-American voter in the first congressional

district; and Jose Hernandez, an Hispanic voter in the first congressional district. The defendants in both suits were Secretary Mitchell and Commissioner Boehm.

The *Barness* suit was transferred from the Eastern District to the Middle District, the district in which Secretary Mitchell and Commissioner Boehm are officially domiciled. The *Barness* and *Nerch* suits were consolidated, and a three-judge court was convened, as is required "when an action is filed challenging the constitutionality of the apportionment of congressional districts. . . ." 28 U.S.C. § 2284(a). By agreement of the parties, the consolidated federal court actions were stayed.

On January 30, in the *Mellow* suit in the Commonwealth Court, Judge Barry (1) granted a preliminary injunction declaring unconstitutional the redistricting scheme in effect at that time and (2) directed that any proposed redistricting plans be filed in the Commonwealth Court by February 11. On February 12, President Judge Craig scheduled a hearing to begin on February 13, to consider the plans filed. On February 13, the Pennsylvania Supreme Court, acting pursuant to 42 Pa. Cons. Stat. Ann. § 726 (1981), which authorizes the Pennsylvania Supreme Court to take plenary jurisdiction of proceedings in any Pennsylvania court "involving an issue of immediate public importance," assumed jurisdiction over *Mellow*. Simultaneously, the Pennsylvania Supreme Court directed Judge Craig, sitting as a Special Master, to conduct the scheduled hearing and to submit a report by February 26.

On February 14, Representative Matthew Ryan, the Republican leader in the lower house of the General Assembly and an intervenor in the *Mellow* state court suit, filed a federal court complaint in the Middle District. The *Ryan* suit was consolidated with the stayed *Nerch* and *Barness* suits. Thereupon Representative Ryan sought to vacate the stay so that he might move in this court for a preliminary injunction halting the state court proceedings over which the Pennsylvania Supreme Court had assumed plenary jurisdiction.

We vacated the stay with a view to addressing Representative Ryan's motion for a preliminary injunction.[1] A hearing on that motion was scheduled for February 27. Meanwhile, in an amended complaint, Representative Ryan was joined by two other Republican state legislators, Senators F. Joseph Loeper and D. Michael Fisher—who, like Representative Ryan, were parties to the *Mellow* state court suit—and also by three registered voters: Michelle Agatston, an African-American voter in the fourteenth congressional district; Luis Cruz, an Hispanic voter in the first congressional district; and Lawrence R. Watson, II, an African-American voter in the second congressional district.

In a memorandum filed on February 25, this court identified the issues we thought the parties should focus on at the February 27 hearing:

> With a view to assisting the parties in preparing for the hearing on February 27, we think it may be helpful to identify what we currently see as a paramount obstacle the Ryan plaintiffs must surmount in order to establish entitlement to preliminary injunctive relief. Taking all facts stated in the motion to be true, we have difficulty perceiving that irreparable injury to a federally protected interest of any of the Ryan plaintiffs is likely to occur as a result of the Pennsylvania Supreme Court's moving forward to formulate and approve a reapportionment plan. As presently

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[1] In opposing the motion for a preliminary injunction, Secretary Mitchell and Commissioner Roehm argued that "[i]f a plan were adopted by the [Pennsylvania] Supreme Court which, as Representative Ryan fears it will, were to contravene his constitutional rights or his rights under the Federal Voting Rights Act (even though Representative Ryan is not a member of any recognized minority group), then he could immediately return to this Court to request a preliminary injunction to enjoin the defendants from proceeding with congressional elections using such an illegal plan." Answer of Defendants to Motion of Plaintiff for Relief from Stay and Expidited Hearing of Plaintiff's Motion for Preliminary Injunction, p.6.

> advised, we see no reason to doubt that the Pennsylvania Supreme Court is in a position at this point to formulate and approve such a plan substantially before this court would be able to do so, and it would appear to us to be in the public interest for a plan to be formulated and approved at the earliest possible time. If this is correct, it suggests that the appropriate action for this court is to stay its hand until the Pennsylvania Supreme Court acts. This would in turn mean that if the Pennsylvania Supreme Court approves a plan that any of the Ryan plaintiffs (who has adequate standing to raise the pertinent issue(s)) maintains is inconsistent with the Voting Rights Act and/or the Constitution, he or she would be able to file a renewed application for relief.

Meanwhile, on February 24, Judge Craig, as Special Master, filed a detailed report dealing with issues both of fact and of law. Judge Craig recommended that the Pennsylvania Supreme Court adopt a plan designated as Mellow 2, the second of two plans submitted by the Democratic plaintiff-senators who had initiated the state court suit. Judge Craig found Mellow 2 to be superior to the other plans considered, including one submitted by Senator Loeper. A plan proposed by Representative Ryan was not considered by Judge Craig on the ground that it was not submitted until February 12, a day after the February 11 deadline set by Judge Barry on January 30.

On February 27, before addressing the motion for a preliminary injunction, this court granted certain motions for intervention and remitted other would-be intervenors to *amici curiae* status. In all subsequent phases of the federal court litigation the active participants have been (1) the six Ryan plaintiffs, (2) defendants Mitchell and Boehm, (3) the eight Mellow defendant-intervenors, and (4) defendant-intervenors Democratic Representatives Harold James, Anthony Williams, Curtis Thomas and Vincent Hughes and the Philadelphia Leadership Conference

and the Frederick Douglass Society. An additional group of defendant-intervenors, Speaker of the Pennsylvania House of Representatives Robert W. O'Donnell, and two of his fellow Democratic members of the House leadership, have played a more circumscribed role—opposing the contentions of the Ryan plaintiffs and generally supportive of the positions taken by the other defendant-intervenors and by defendants Mitchell and Boehm. The original federal court plaintiffs—Nerch and the Barness group—have been quiescent since the mid-February dissolution of the stay.

At the February 27 hearing no testimony was presented. Argument was had on the questions of law posed by the Ryan plaintiffs' motion for a preliminary injunction and the defendants' and defendant-intervenors' request that we abstain. The motion for a preliminary injunction was denied and the motion to abstain was reserved.

On March 10, the Pennsylvania Supreme Court announced that it had adopted Mellow 2, the redistricting plan recommended to it by Judge Craig. On March 26, the court filed a unanimous opinion, written by Justice Papadakos, explaining its conclusions that Mellow 2 satisfies the Constitution's "one-person one-vote," mandate and that it fulfills the requirements of Section 2 of the Voting Rights Act.

On March 30, March 31, and April 1, this court heard evidence and arguments with respect to the Ryan plaintiffs' claims that Mellow 2, is unconstitutional and contravenes the Voting Rights Act. Also, defendants Mitchell and Boehm orally moved for dismissal for lack of subject-matter jurisdiction: they contended that if this court were to retain jurisdiction and inquire into the merits of the redistricting plan promulgated by the Pennsylvania Supreme Court, such an inquiry would constitute federal district court review of a decision of the highest court of a state, a form of lower federal court intervention in the state judicial process foreclosed by the so-called "*Rooker-Feldman* doctrine." Since the other parties had not had prior notice of the Mitchell-Boehm motion to dismiss, decision

on that motion was reserved. Also, argument was heard on a motion filed by the Mellow intervenors asking this court to stay its hand on grounds of "*Younger* abstention." At the close of the three-day hearing, it was agreed that, after the hearing record was transcribed, (1) the parties would file briefs addressing the merits issues and the jurisdiction and abstention issues, and (2) final argument would be had following submission of the briefs. Pursuant to these arrangements, comprehensive briefs were filed, and, on May 19, extended argument was presented.

II.

We first consider two threshold questions: (1) whether we have subject-matter jurisdiction and (2), if so, whether we should nonetheless abstain.

A. *Rooker-Feldman*

In *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923), the Court held that a federal district court lacked jurisdiction over a suit which sought a declaration of the unenforceability, on various federal constitutional grounds, of a civil judgment rendered in a state trial court and affirmed by the state supreme court. The Court's holding appeared to be an unsurprising application of the principle, central to the mutually supportive structures of the federal and state judiciaries since 1789, that state court rulings on issues of federal law are not reviewable by any federal tribunal other than the Supreme Court of the United States on appeal from or writ of certiorari to the highest state court in which judgment can be had. "Under the legislation of Congress, no court of the United States other than this Court could entertain a proceeding to reverse or modify the judgment for errors of that character." *Id.* at 416.

Rooker, decided in 1923, slept undisturbed for almost six decades. Then, after scholarly reexamination, Chang, *Rediscovering the Rooker Doctrine: Section 1983, Res Judicata and the Federal Courts*, 31 Hastings L. J. 1337 (1980), the venerable

case was cited approvingly by the Supreme Court in *D.C. Court of Appeals v. Feldman*, 460 U.S. 462 (1983). In *Feldman*, two candidates for admission to the District of Columbia bar brought suit in the United States District Court for the District of Columbia to challenge, on constitutional grounds, determinations by the District of Columbia Court of Appeals—the highest court in the local District of Columbia court structure--that the plaintiffs were ineligible for admission. The ineligibility arose from the plaintiffs' failure to satisfy an established admissions requirement prescribed by the District of Columbia Court of Appeals in the exercise of its statutory authority over bar membership in the District of Columbia. The requirement was that the applicant for admission be a graduate of a law school approved by the American Bar Association. One of the plaintiffs was a retired Navy pilot who had graduated from an unapproved law school. The other plaintiff had taken a number of law courses but was not a law school graduate; he was, however, admitted to practice both in Virginia and in Maryland, and he had in fact practiced law for several years. The refusal of the District of Columbia Court of Appeals to waive its rule in these two instances was challenged, on constitutional grounds, in the United States District Court for the District of Columbia. That court dismissed on jurisdictional grounds: "the admission and exclusion of attorneys by the highest court of a state is the exercise of a judicial function which may be reviewed only by the United States Supreme Court." The United States Court of Appeals for the District of Columbia Circuit reversed, holding that the two decisions of the District of Columbia Court of Appeals not to waive its rule at plaintiffs' behest "were not judicial in the federal sense, and thus did not foreclose litigation of the constitutional contentions in the District Court." *Feldman v. Gardner*, 661 F. 2d 1295, 1298 (D.C. Cir. 1981). The Supreme Court, speaking through Justice Brennan, reversed, agreeing with the district court that each of the two District of Columbia Court of Appeals non-waiver decisions was "a judicial proceeding." 460 U.S. at 481. And "[r]eview of such determinations can be obtained only in this Court. See 28 U.S.C. § 1257. See also *Atlantic Coast Line R. Co. v. Locomotive Engineers*, 398 U.S. 281, 296 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415, 416 (1923)." 460 U.S. at

476. Thus did *Rooker*'s platitude become the "*Rooker-Feldman* doctrine." Justice Brennan's opinion was, however, at pains to define the limits of the Court's holding: although the district court lacked jurisdiction to entertain challenges to the rule *as applied*, the district court had jurisdiction to entertain challenges to the rule *as adopted*, because the adoption of a bar admission rule did not appear to be a judicial proceeding. *Id.* at 486. *Cf.* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* (3d. ed. 1988) 1632-38.

Defendants Mitchell and Boehm argue that, if this court proceeds to examine the constitutionality of the Pennsylvania Supreme Court plan, it will be pursuing exactly the course—review of a decision of the highest court of a state—that *Rooker-Feldman* bars district courts from undertaking and remits to the exclusive authority of the Supreme Court of the United States.

It is true that the Pennsylvania Supreme Court measured Mellow 2 against the "one-person one-vote" requirement and found that it passed muster. And it is also true that the Pennsylvania Supreme Court, in a section of its opinion captioned "Section 2 of the Voting Rights Act," announced that it agreed with Judge Craig that Mellow 2 "best protected minority voting rights." *Mellow v. Mitchell*, 607 A.2d 204, 208-210 (Pa. 1992). Further, it is true that the Pennsylvania Supreme Court went on specifically to find that: (1) Mellow 2 "did *not* effectively dilute minority voting strength in the Second Congressional District," *id.* at 208 (emphasis in original); (2) "all plans except [Mellow 2] *did* dilute minority voting strength in the First Congressional District," *id.* (emphasis in original); and (3) with respect to the fourteenth congressional district, "[n]either the Loeper intervenors nor anyone else has offered any evidence regarding the degree of influence presently enjoyed by minority voters in Allegheny County, much less any evidence that such influence would be impaired by the small reduction [from 23% to 17.81%] in the African-American percentage in a district that already has a relatively small African-American population." *Id.* at 210 n.3. Moreover, we agree with defendants Mitchell and Boehm that the decision of the

Pennsylvania Supreme Court, reflected in its carefully crafted opinion, was a *judicial* act—not, as the Ryan plaintiffs contend, a *legislative* act outside the rubric of *Rooker-Feldman*.

However, in one major respect the situation at bar is unlike the situation presented in *Rooker* and in *Feldman*. Both in *Rooker* and in *Feldman* the party seeking to invoke district court jurisdiction had participated—and had lost—in the prior proceeding sought to be circumvented, or to be collaterally attacked, in the district court. In the situation at bar, certain of the Ryan Plaintiffs—Representative Ryan, and Senators Loeper and Fisher—were parties to the state court litigation; but others—Ms. Agatston and Messrs. Cruz and Watson—were not.

As the Court of Appeals for the Third Circuit recently observed in a very similar setting:

> [T]he *Rooker-Feldman* doctrine has a close affinity to the principles embodied in the legal concepts of claim and issue preclusion. *See* Wright, Miller & Cooper *[Federal Practice and Procedure]*, § 4469 at 668 ("Although no substantial harm seems to have been done by the jurisdictional cases, it would be better to go straight to the res judicata rules that justify preclusion"). The basic premise of preclusion is that non-parties to a prior action are not bound. . . .
>
> We have found no authority which would extend the *Rooker-Feldman* doctrine to persons not parties to the proceedings before the state supreme court and are referred to none.

Valenti v. Mitchell, 962 F.2d 288, 297 (3d Cir. 1992).[2]

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[2] The *Valenti* excerpt from the Wright & Miller treatise on federal practice and procedure is taken from a longer discussion which warrants quotation (§ 4469 at pp. 663-68, footnotes omitted):

> Many decisions, drawing from Rooker v. Fidelity Trust Co., have transformed res judicata doctrine into a rule that lower federal courts lack jurisdiction to review state courts. The Rooker case itself was framed as a bill in equity for relief from a state court judgment that was claimed to violate the contract clause, the due process clause, and other federal prohibitions. The Court's opinion makes it clear that it could not find any ground for collateral attack on the judgment—it found the bill to be "merely an attempt to get rid of the judgment for alleged errors of law committed in the exercise of" full state court jurisdiction. It also stated, however, that "[u]nder the legislation of Congress, no court of the United States other than this court could entertain a proceeding to reverse or modify the judgment for errors" of constitutional law. This jurisdictional transmutation of res judicata doctrine seems entirely unnecessary. To be sure, it seems elementary that the statutes giving the Supreme Court jurisdiction to review state court judgments should be read with the statutes conferring original jurisdiction on lower federal courts to establish that direct review of state courts can be had only in the Supreme Court. The rare cases that are expressly framed as an appeal from a state court to a lover federal court may reasonably be dismissed for lack of jurisdiction. Most of the cases, however, involve some form of direct attack on the state judgment or involve simple redundant litigation. For these cases, jurisdictional doctrine seems unnecessary and potentially mischievous. Some courts that have noted the jurisdictional doctrine have indicated a preference for res judicata or other grounds of decision. The doctrine has never been expanded to the logical corollary that as between two federal district courts res judicata is a matter of jurisdiction, since exclusive jurisdiction for appellate review lies in the courts of appeals. A jurisdictional approach is an open invitation to apply federal rules of preclusion without careful thought as to the content of state rules or any possible justifications for ignoring them. Jurisdictional perspectives might expand the

On the face of the record, it would therefore appear that, while *Rooker-Feldman* precludes our consideration of the claims of Representative Ryan and Senators Loeper and Fisher, it is no bar to our consideration of the claims of Ms. Agatston, Mr. Cruz and Mr. Watson.

Defendants Mitchell and Boehm argue, however, that Ms. Agatston and Messrs. Cruz and Watson should be treated as "in privity" with Messrs. Ryan, Loeper and Fisher and hence bound by the Pennsylvania Supreme Court ruling and foreclosed from litigating in this court by *Rooker-Feldman*. But the claim of "privity" appears, on examination, to be nothing more than an allegation that Ms. Agatston and Messrs. Cruz and Watson are of the same political persuasion—Republican—as Messrs. Ryan, Loeper and Fisher, and closely tied to their political interests. Nothing in the record suggests that there was any bad faith or other disingenuity attendant on the non-participation of Ms. Agatston and Messrs. Cruz and Watson in the state court litigation. "A non-party is not precluded from relitigating matters decided in a prior action simply because it passed by an opportunity to intervene." *Valenti*, 962 F.2d at 297.

To bolster their argument that Ms. Agatston and Messrs. Cruz and Watson should be regarded as bound by the state court judgment, defendants Mitchell and Boehm contend that Ms. Agatston and Messrs. Cruz and Mitchell [sic] had standing to

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> number of persons affected by a judgment, and cause confusion as to the effects of dismissing the federal action. Any possible advantage in the doctrine that jurisdictional questions can be raised sua sponte can be parallelled by the power to raise res judicata sua sponte. Even in the special case in which the Supreme Court has dismissed an appeal from the state judgment for want of a substantial federal question, it is better to rely on the res judicata effects of the Supreme Court's decision than to invoke a jurisdictional doctrine. Although no substantial harm seems to have been done by the jurisdictional cases, it would be better to go straight to the res judicata rules that justify preclusion.

petition the Supreme Court of the United States for a writ of certiorari to the Pennsylvania Supreme Court. But, on oral argument before this court, defendants Mitchell and Boehm were not able to cite authority for the proposition that non-parties to a state court proceeding have standing to petition for certiorari. May 19, 1992 Oral Arg. Tr., at 57-9. The point has an importance that connects with, but also transcends, the res judicata question. As already noted, the basic significance of *Rooker-Feldman* is that it underscores the central architectural theme of American jurisprudence that decisions of the highest court of a state on issues of federal law are reviewable only by the Supreme Court of the United States. But in the present circumstance it is not apparent that *any* litigant before the Pennsylvania Supreme Court was positioned to challenge before the Supreme Court of the United States that portion of the decision of the Pennsylvania Supreme Court holding that the second and fourteenth congressional districts, as projected in Mellow 2, comport with Section 2 of the Voting Rights Act. Our examination of Judge Craig's and Justice Papadakos' opinions reveals no African-American litigant who, as a voter in either the second or fourteenth congressional district, was challenging Mellow 2 on that ground in the Pennsylvania Supreme Court.[3] To that extent, therefore, a timely petition for certiorari to the Pennsylvania Supreme Court, had one been filed,[4] could not have brought before the Supreme Court of the United States the full range of issues presented to this court.

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[3] The Pennsylvania Supreme Court also discussed the impact of redistricting in the first congressional district, concluding that Mellow 2 enhanced African-American voting strength more than any other plan the court considered. We know of no African-American voter from the First Congressional District contesting that finding in the state proceeding. In this court, we think that Mr. Cruz—an Hispanic voter in the first congressional district—lacks standing to press the issue of the adequacy of African-American voting strength in the first congressional district.

[4] It is our understanding that the date by which a certiorari petition would have to have been filed was June 8, 1992, and that no petition had in fact been filed by that date.

We conclude that the three Ryan plaintiffs not parties to the state court litigation are not in privity with Representative Ryan and Senators Loeper and Fisher. Accordingly, while *Rooker-Feldman* does signify that the Ryan, Loeper and Fisher claims are not cognizable, it is no bar to the Agatston, Cruz and Watson claims.[5] We also conclude that all three of these plaintiffs have standing to challenge the conformity of the Pennsylvania Supreme Court plan with "one-person one-vote." Moreover, Ms. Agatston, as an African-American voter in the projected fourteenth congressional district, has standing to challenge the alleged dilution of African-American voting strength in that district; similarly, Mr. Watson, as an African-American voter in the projected second congressional district, has standing to challenge the alleged dilution of African-American voting strength in that district.

B. *Younger* Abstention

The Mellow defendant-intervenors contend that, pursuant to the principles of abstention first enunciated in *Younger v. Harris*, 401 U.S. 37 (1971), and elaborated in subsequent cases, it is this court's duty to stay its hand, given that a previously begun state court proceeding involving important state interests constituted an adequate vehicle for addressing whatever federal constitutional issues the Ryan plaintiffs have raised in this court.

Younger v. Harris was, in its inception, an elaborately magisterial statement of what was, conceptually, a relatively modest

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[5] *See* May 19, 1992 Oral Arg. Tr. at 57:

> JUDGE STAPLETON: So unless we find all of the plaintiffs in privity, you lose this argument?
>
> MR. DUNLAP: I do. I do, unless there is a privity argument—I lose the argument on Rooker-Feldman. Only—if the three minority plaintiffs in this case are not in privity with the three plaintiffs who concededly were in the state court, then under *Valenti* I don't think I can win.

doctrinal demarche. As the Court put the matter in *Samuels v. Mackell*, 401 U.S. 66, 69 (1971), one of *Younger*'s companion cases, "a federal court should not enjoin a state criminal prosecution begun prior to the institution of the federal suit except in very unusual situations where necessary to prevent immediate irreparable injury." In later cases, *Younger* outgrew its beginnings. In *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982), the Court, speaking through Chief Justice Burger, declared:

> The policies underlying *Younger* are fully applicable to noncriminal judicial proceedings when important state interests are involved. . . . "[T]he . . . pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims. . . ."

Id. at 432 (quoting *Gibson v. Berryhill*, 411 U.S. 564 (1973)).

There is no doubt that important state interests, involving every resident of the Commonwealth, are involved in the process of congressional redistricting. The magnitude and scope of those interests are matched only by the magnitude and scope of the federal interests in assuring full compliance with federal constitutional and statutory norms. As we have had occasion to point out, the Pennsylvania Supreme Court's opinion addressed not only the constitutional "one-person one-vote" issues, but also the Voting Rights Act issues which, because under the supremacy clause federal statutes are paramount to state law, are themselves matters of constitutional dimension. But when we inquire, as *Middlesex* instructs, "whether the state proceedings afford an adequate opportunity to raise the constitutional claims," 457 U.S. at 432, we conclude that the answer is in the negative. The answer is in the negative because, as we have noted in our discussion of *Rooker-Feldman*, there apparently was no party to the state court proceedings who would have had standing to seek review by the Supreme Court of the United States of the Pennsylvania Supreme Court's rulings on the Voting Rights Act questions. To that extent,

an essential predicate of *Younger*—that state courts are, as a general matter, as competent as federal courts to address federal claims subject to ultimate review by the Supreme Court—is, in this instance, unfulfilled, because, if certiorari to the Pennsylvania Supreme Court had been sought, the Supreme Court of the United States would have had truncated revisory authority. Accordingly, we conclude that *Younger* abstention would be inappropriate in this case.[6]

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[6] Whether, in any event, congressional redistricting cases lie outside the *Younger* framework is a question which, in view of our determination that the ingredients of *Younger* are not present in this case, we need not address. Only one instance of *Younger* abstention in a congressional redistricting case has come to our attention. *Members of the California Democratic Congressional Delegation v. March Fong Eu*, 1992 U.S. Dist. LEXIS 5737 (N.D. Cal., March 3, 1992). In that case the three-judge court was divided: Judge Tang filed a strong dissent to Judge Legge's opinion of dismissal.

We also need not consider whether abstention would have been compatible with our stance in denying the Ryan plaintiffs' motion for a preliminary injunction against the state court proceedings. Denial of the motion presupposed that the Ryan plaintiffs could return to this court if unsatisfied with the action of the Pennsylvania Supreme Court. *See* note 1, *supra*, and following text.

III.

We now turn to the Ryan plaintiffs' argument that the redistricting[7] plan adopted by the Pennsylvania Supreme Court is unconstitutional.

A.

Art. I, § 2 of the Constitution of the United States provides:

> The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

In a line of cases dating from the 1960s, the Supreme Court has interpreted the Constitution's mandate that representatives be elected "by the People of the several States" to require that every vote cast in a congressional election be, "as nearly as practicable," equal to every other. *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964).

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[7] Although the terms "reapportionment" and "redistricting" have frequently been used interchangeably, technically this case deals with redistricting. *See Davis v. Bandemer*, 478 U.S. 109, 161 n.1 (1986) (Powell, J., concurring in part, dissenting in part) ("Technically, the words 'apportionment,' and 'reapportionment' apply to the 'allocation of a finite number of representatives among a fixed number of pre-established areas,' while 'districting' and'redistricting' [sic] refer to the drawing of district lines"). After the census, the President receives the relevant data from the Secretary of Commerce, "reapportions" the 435 house seats among the states, and sends a statement to Congress outlining the reapportionment. *Franklin v. Massachusetts*, 60 U.S.L.W. 4781 (U.S. June 26, 1992). The Clerk of the United States House of Representatives then informs each of the states of the number of representatives to which it is entitled. At that point, those states that are entitled to more than one representative proceed to "redistrict" their states to take into account shifts in population and, potentially, any increase or decrease in the number of congressional districts.

See also Karcher v. Daggett, 462 U.S. 725 (1983); *White v. Weiser*, 412 U.S. 783 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969).[8] In other words, when tackling redistricting problems, state legislatures[9] are to strive for absolute mathematical equality in population among congressional districts. The courts and commentators have widely referred to this standard as the "one-person one-vote" rule. *See, e.g., Wesberry*, 376 U.S. at 18 (Clark, J., concurring in part, dissenting in part).

The Court's decisions following *Wesberry* have steadfastly refused to interpret the one-person one-vote standard as anything but a call to mathematical exactness. For instance, in *Kirkpatrick*, the Court rejected Missouri's invitation to fix some level of population deviation among districts small enough to be considered *de minimis* and therefore automatically constitutional. *Kirkpatrick*, 394 U.S. at 530. Moreover, in *Karcher*, the Court refused to conclude that maximum population deviations smaller than the predictable undercount in census data are beyond judicial scrutiny. *Karcher*, 462 U.S. at 731. These cases demonstrate that mathematical equality in redistricting remains the lodestar--there are no *de minimis* deviations.

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[8] Some members of the Court have preferred to analyze congressional redistricting cases under the same standard as legislative reapportionment cases, i.e., the equal protection clause of the fourteenth amendment. *See Karcher*, 462 U.S. at 747 (Stevens, J., concurring) ("Even if Art. I, §2, were wholly disregarded, the "one person, one vote" rule would unquestionably apply to action by state officials defining congressional districts just as it does to state action defining state legislative districts [through the Equal Protection Clause."); *Wesberry*, 376 U.S. at 19 (Clark, J., concurring in part, dissenting in part) (same); *Colgrove v. Green*, 328 U.S. 549, 569 (1946) (Black, J., dissenting) (same). Other members of the Court have found nothing in the Constitution to support this principle. *See, e.g., Wesberry*, 376 U.S. at 20 (Harlan, J., dissenting).

[9] Of course, the state and federal courts are also subject to this standard when, as all too often is the case, the task of formulating a constitutional redistricting plan falls on the shoulders of the judiciary.

The Court has based its adherence to the "unusual rigor of th[is] standard," *id.* at 732, on two grounds. First, "[i]f state legislators knew that a certain *de minimis* level of population differences was acceptable, they would doubtless strive to achieve that level . . . ." *Id.* at 731. Accordingly, because the Constitution requires that plan drafters endeavor to attain some level of arithmetic exactness, it might as well be equality rather than something less than equality. Second, as census-taking techniques and computer technology continue to improve by leaps and bounds, attaining the ideal of population equality is more and more possible. *Id.* at 731. This reasoning recognizes the fact that although the ten years between each round of redistricting is merely half of a generation in human terms, the same period represents several generations of computer software. Therefore, the rigor of the "as nearly as practicable" standard necessarily takes into account the fact of modern life that the impossibility of yesterday may be the "practicability" of today.[10]

The current round of cases demonstrates that the computer technology associated with this task of redistricting has reached the point predicted by Justice Fortas in his concurring opinion in *Kirkpatrick*. It is now apparently possible for computer generated redistricting plans to "run[] the congressional district line down the middle of the corridor of an apartment house or even divide the residents of a single family house between two districts."

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[10] Two opinions of Justice White in this area separated by fourteen years demonstrate the wisdom of crafting a standard that responds to changes in technology. *Compare Wells v. Rockefeller*, 394 U.S. 542, 553 (1969) (White, J., dissenting) ("As a rule of thumb, a variation between the largest and smallest district of no more than 10% to 15% would satisfy me, absent quite unusual circumstances not present in any of these cases. At the very least, at this trivial level, I would be willing to view state Explanations of the variance with a more tolerant eye.") *with Karcher*, 462 U.S. at 782 (White, J., dissenting) ("Although I am not wedded to a precise figure, in light of the current range of population deviations, a 5% cutoff appears reasonable. I would not entertain judicial challenges, absent extraordinary circumstances, where the maximum deviation is less than 5%. Somewhat greater deviations, if rationally related to an important state interest, may also be permissible.")

Kirkpatrick, 394 U.S. at 538 (Fortas, J., concurring). *See, e.g. Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 644 (N.D.Ill. 1991) ("Of the 20 proposed congressional districts in the *Hastert* Plan, 18 contain the ideal population of 571,530. The remaining two districts have populations of 571,531."); *see also* Plaintiffs' Ex. #12 (purporting to divide state of Pennsylvania into 11 districts containing 565,793 people and 10 districts containing 565,792).[11]

The advent of such technology combined with the rigor of the standard, however, does not signal the end of judicial review of state redistricting. The analysis of proposed redistricting plans is not a wholly mechanical undertaking, where the plan with the lowest deviation from the ideal wins no questions asked. Proof of the existence of a plan with lower deviations merely satisfies the plaintiff's prima facie case. The Supreme Court in *Karcher* stated:

> [T]wo basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw district lines of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant

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[11] Because under the current census figures, the total population of the Commonwealth of Pennsylvania is not evenly divisible by the number of House seats allotted to the Commonwealth, only Solomon is wise enough to create a redistricting plan with zero deviation.

variance between districts was necessary to achieve some legitimate goal.

Karcher, 462 U.S. at 730-31. Clearly, then, once a plaintiff comes forward with credible evidence that the overall deviations in the plan proffered by the state could be reduced, the burden shifts to the state to justify the deviations in its plan by reference to legitimate state interests furthered by the deviation.

The Court went on in *Karcher* to enumerate several legitimate goals other than population equality that a state might pursue in redistricting. "Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." *Id.* at 740.[12] Moreover, while a state must justify each specific deviation rather than relying upon general assertions, the burden on the state is flexible—i.e., the larger the deviation, the heavier the burden of justification. *Id.* at 741.

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[12] This holding of *Karcher* that a state has the opportunity to rebut the plaintiff's prima facie case by justifying the deviations in its redistricting plan apparently overrules statements made in the Court's earlier redistricting cases. *See Kirkpatrick*, 394 U.S. at 533-34 ("[W]e do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries."); *Mahan v. Howell*, 410 U.S. 315, 341 (1973) (Brennan, J., concurring in part, dissenting in part) ("[T]he need to preserve the integrity of political subdivisions as political subdivisions may, in some instances, justify small variations in the population of districts from which state legislators are elected. But that interest can hardly be asserted in justification of malapportioned congressional districts."); *see also Karcher*, 462 U.S. at 778-780 (White, J., dissenting). *Cf. White v. Weiser*, 412 U.S. 783, 795-97 (1973) (In remedy phase, court must follow the policies and preferences of the state, "whenever adherence to state policy does not detract from the requirements of the Federal Constitution.")

B.

With this above understanding of the law of redistricting in mind, we now proceed to apply this understanding to the challenged plan adopted by the Pennsylvania Supreme Court. The plan divides the total population of the Commonwealth, 11,881,643 people, into twenty-one congressional districts of varying sizes. The ideal population of any district is 565,793 people. The following chart, reflecting the congressional districts as established in the Pennsylvania Supreme Court plan, shows the total population of each district and the deviation from the ideal in both numbers of people and percentage of population.

Cong. District	Population	Deviation	% Deviation
District 1	565,768	-25	-0.0044%
District 2	565,815	+22	0.0039%
District 3	565,775	-18	-0.0032%
District 4	565,792	-1	-0.0002%
District 5	565,813	+20	0.0035%
District 6	565,786	-7	-0.0012%
District 7	565,760	-33	-0.0058%
District 8	565,787	-6	-0.0011%
District 9	565,803	+10	0.0018%
District 10	565,796	+3	0.0005%
District 11	565,798	+5	0.0009%
District 12	565,794	+1	0.0002%
District 13	565,767	-26	-0.0046%
District 14	565,787	-6	-0.0011%

District 15	565,810	+17	0.0030%
District 16	565,798	+5	0.0009%
District 17	565,817	+24	0.0042%
District 18	565,781	-12	-0.0021%
District 19	565,779	-14	-0.0025%
District 20	565,815	+22	0.0039%
District 21	565,802	+9	0.0016%

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[13] The numbers contained in the table are in two ways different from those contained in the appendix to the Pennsylvania Supreme Court's opinion in this matter. First, the supreme court appendix listed the total population of the new first congressional district as 565,802 rather than 565,768. If the former is correct, the first district would be 9 people over the ideal rather than 25 people under. However, other papers submitted by the parties, e.g., defendant's exhibit #1 and Attachment A to plaintiffs' post-trial brief, list the population of the first district as that listed in the above chart. We have concluded that the number set out in the chart is correct and that the population listed in the supreme court opinion is a typographical error. Otherwise, the supreme court plan accounts for a greater total population for the Commonwealth than that reported by the Census Bureau.

The second difference between the chart and the Pennsylvania Supreme Court opinion is the shift of one census block consisting of 6 people between the seventh and sixteenth congressional districts. This problem apparently arises because part of Birmingham Township in Chester County is discontiguous from the rest of the township because it is split by a waterway. Although the legal description in the Pennsylvania Supreme Court opinion included this block in the sixteenth district, the population figures for the two districts did not reflect this correction. After an initial misunderstanding, the parties agreed at trial that the census block in question was properly considered part of the sixteenth congressional district. Therefore, the numbers in the above chart reflect the addition of those six people in the sixteenth district and their subtraction from the seventh district.

The maximum deviation of this plan is 0.01007%.[14] The average deviation is 13.62 people per district or 0.00241%.

This court ruled during the course of these proceedings, and the defendants conceded in their brief and at oral argument, that the plaintiffs presented sufficient evidence to meet their prima facie case. *See* Trial Tr. at 83; May 19, 1992 Oral Arg. Tr. at 29. The plaintiffs introduced several plans with lower population deviations than those contained in the Pennsylvania Supreme Court plan. Courts have widely concluded that this type of evidence is sufficient to shift the burden to the defendants to justify the deviations. *See, e.g., Karcher*, 462 U.S. at 739 n.10; *Stone v. Hechler*, 782 F. Supp. 1116, 1125 (N.D. W.Va. 1992).

The defendants advanced two justifications for the deviations contained in the Pennsylvania Supreme Court plan. The first justification was the desire to create two minority-in-the majority-districts in Philadelphia in order to comply with the Voting Rights Act. As noted in significant detail below, the first and second congressional districts were drawn with this goal in mind. The importance of this decision for present purposes, however, is that drawing these districts in this manner had a "ripple effect" in the surrounding congressional districts. *See* Trial Tr. at 457. Accordingly, the three congressional districts surrounding the City of Philadelphia, the seventh, thirteenth, and eighth congressional districts, are all below the ideal population.

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[14] The maximum deviation is derived by adding the absolute value of the population deviation of the smallest district to the absolute value of the population deviation in the largest district and dividing that sum by the population of the ideal district. In the supreme court plan, the seventh congressional district is the smallest, 33 people under the ideal. The seventeenth district is the largest, 24 people over the ideal. The sum, 57, divided by the ideal district population of 565,793 yields the maximum deviation—0.01007%. The maximum deviation of the supreme court plan was affected by the switch of the one census block referred to in note 7. Therefore, the maximum deviation of 0.0111% referred to in the supreme court opinion is actually minutely lower.

The second, and more pervasive justification for the deviations in the Pennsylvania Supreme Court plan was the desire to avoid splitting municipalities between two congressional districts. As an initial matter, the plaintiffs argue that the defendants have failed to prove that avoidance of municipal splits is actually a legitimate interest of the Commonwealth. They argue that *Karcher* merely identified avoiding municipal splits as a *potential* state interest that *might* justify deviations but that the defendants have failed to prove that it is actually a policy of the Commonwealth. The plaintiffs note in this regard that unlike other states, Pennsylvania has not expressed its interest to avoid municipal splits in its constitution or through legislation.

The constitution and statutes of Pennsylvania are not the only sources of public policy for the Commonwealth. Redistricting plans cannot be drafted without criteria to guide the drafters and, in the absence of criteria provided by statute or the constitution, the Supreme Court of Pennsylvania had no choice but to conclude that it was authorized to establish those criteria. This conclusion is a matter of Pennsylvania state law and we are bound by it. Exercising this state-law derived authority, the Pennsylvania Supreme Court identified in its opinion the avoidance of municipal splits as an important public policy of the Commonwealth. *Mellow v. Mitchell*, 607 A.2d 204 (Pa. 1992). Nothing more need be said; we accept this declaration of public policy as the functional equivalent of a similar legislative or constitutional declaration.

There remains, however, the question whether this policy was consistently applied and adequately justifies the deviations in the Supreme Court plan. The defendants presented the testimony of Mark McKillop in order to meet their burden on this issue. Mr. McKillop is a member of the staff of Senator Robert J. Mellow and was responsible for drafting the plan which eventually was adopted by the Pennsylvania Supreme Court. In each and every situation

where a district contained more than the ideal population,[15] Mr. McKillop testified that the deviations could have been reduced but only by introducing more municipal splits.[16] The defendants rely on this testimony as sufficient justification for each deviation.

The plaintiffs attack the defendants' justification evidence on two grounds. First, they refer to Mr. McKillop's testimony that the Pennsylvania Supreme Court plan splits no municipalities in the western half of the state. This fact demonstrates, the plaintiffs argue, that the policy against splitting municipalities was not consistently applied as required by *Karcher*. We are not persuaded. Western Pennsylvania is far less populated than the eastern half of the Commonwealth and drawing district boundaries without splitting municipalities is, therefore, significantly more feasible in the west. In this context, at least, it is a non sequitur to argue that the absence of a breach of a municipal boundary in Western Pennsylvania indicates that the policy against such breaches was an inconsistently applied pretext.

The plaintiffs' second attack, while more sophisticated, is no more persuasive. The plaintiffs introduced the testimony of their own mapmaker, James D'Innocenzo. Mr. D'Innocenzo, an

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[15] For ease of analysis, we will discuss Mr. McKillop's testimony only as it relates to the districts that contain more than the ideal population. Residents of districts with greater than the ideal population are the only residents of the Commonwealth who can claim that their votes are diluted because of the redistricting scheme. Moreover, every deviation in a district with a population above the ideal is obviously related to the deviation in a neighboring district below the ideal. In other words, by justifying the deviations in districts above the ideal, the defendants are necessarily justifying all other deviations.

[16] In each case Mr. McKillop testified that the deviations could be lowered by introducing municipal splits: fifth district - Trial Tr. at 461; ninth district - Trial Tr. at 583; tenth district - Trial Tr. at 584; eleventh district - Trial Tr. at 585; fifteenth district - Trial Tr. at 458; sixteenth district - Trial Tr. at 458; seventeenth district - Trial Tr. at 460; twentieth district - Trial Tr. at 459; twenty-first district - Trial Tr. at 459.

employee of the Pennsylvania Senate Republican Caucus, testified that by manipulating the boundary between the sixteenth and seventeenth congressional districts in Lancaster County, and shifting 29,000 people between the two, he could reduce the maximum deviation of the entire plan without creating additional municipal splits. As a result, the seventeenth congressional district would no longer be the largest district with 24 people more than the ideal; rather, the twentieth, with 22 people more than the ideal, would be the largest. Further, the difference between the largest and smallest districts would be 55 instead of 57, and the maximum deviation would be 0.00972% instead of 0.01007%.

Contrary to plaintiffs' suggestion we do not think the mathematical exactness standard of *Karcher* and *Kirkpatrick* supports this argument. This is not a case presenting the issue of whether a very small, unjustified maximum deviation renders a redistricting plan constitutionally infirm. This is a case in which a state has made a good faith decision to accept a very small departure from the ideal in order to serve an important countervailing interest. Where a court is convinced that any deviations from the ideal in fact resulted from an attempt to serve that countervailing interest, it need not find the plan constitutionally invalid simply because someone else, using the same criteria, manages to think of an alternative that will reduce the maximum deviation by 35-one hundred thousandths of a percentage point.

The *Karcher* Court indicated that when the burden passes to the state to justify deviations, its "legitimate goal" must be shown to justify each "*significant* variance." *Karcher*, 462 U.S. at 730-31 (emphasis added). We are satisfied that the Pennsylvania Supreme Court's plan represents a good faith effort to serve the two legitimate and important countervailing interests it identified—the creation of a second "minority-in-the-majority" district, and the avoidance of municipal splits—without causing any significant dilution in the vote of any citizen. Accordingly, we refuse to find

that plan constitutionally infirm because the maximum deviation could be reduced to a degree having no practical significance.[17]

In sum, we hold that the defendants have sufficiently justified each deviation in the Pennsylvania Supreme Court plan. Therefore, the plan does not run afoul of the one-person one-vote requirement of Art. I, § 2.

IV.

Finally, we address plaintiffs' claims under § 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("VRA") and the fifteenth amendment.

A. The Voting Rights Act

The plaintiffs assert that the Pennsylvania Supreme Court plan violates § 2 of the Voting Rights Act because it decreases African-American political power in two of the proposed districts: the fourteenth congressional district, which encompasses the city of Pittsburgh and some of its northern and western suburbs, and the second congressional district, which lies within the City of Philadelphia.

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[17] Even if computer gymnastics of this sort could establish constitutional infirmity, we would refuse to find infirmity on the facts of this case. Mr. D'Innocenzo switched populations between the sixteenth and seventeenth districts, both of which already contained greater populations than the ideal. Therefore, while votes in the seventeenth district may have been worth marginally more after his adjustment, votes in the sixteenth district would have been diluted further than they already were. Thus, that adjustment did not reduce the maximum deviation by taking voting power from voters theoretically having more than their share and redistributing it to those who theoretically had less than their share. We are aware of no authority requiring the Commonwealth to take such measures in order to produce a constitutional redistricting plan.

Section 2 of the Voting Rights Act, as amended in 1982, reads:[18]

> **Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**
>
> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C. § 1973(f)(2)], as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their

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[18] In *City of Mobile v. Bolden*, 446 U.S. 55 (1980), the Supreme Court held that, to prove a violation of the fifteenth amendment, a plaintiff must show discriminatory intent on the part of the defendants. In response, Congress amended § 2 of the VRA to make it clear that a showing of such intent was not necessary to prevail under the statute, and that the disparate impact test of *White v. Regester*, 412 U.S. 755 (1973) should apply. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S.C.C.A.N. 177, 204; *see also Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

> choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(2). Thus, § 2 may be violated by either intentionally discriminatory conduct or through facially neutral standards which have a disparate impact on minority voters.

The disparate impact prong employs a "results test" which looks at the totality of circumstances to determine whether "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice." *Chisom v. Roemer*, 111 S. Ct. 2354, 2364 (1991) (citing S. Rep. No. 417, 97th Cong., 2d Sess. 27, *reprinted in* 1982 U.S.C.C.A.N. 177, 204).

The Senate Report which accompanied the 1982 amendment to § 2 offers a number of factors for consideration in determining whether a voting standard, practice, or procedure is illegal:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, antisingle shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating Process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;[114]

6. whether political campaigns have been characterized by overt or subtle racial appeal;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

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[114] The courts have recognized that disproportionate educational employment [sic], income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of African American participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparage socio-economic status and the depressed level of political participation. [citations omitted].

S. Rep. No. 417, 97th Cong., 2d Sess. 28-29, *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. The Senate Report also identified two additional factors which may have some relevance in divining the existence of a § 2 violation depending on the circumstances of the individual case:

- whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;

- whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 29, 1982 U.S.C.C.A.N. at 207.

None of these factors is dispositive, nor is any one to be given any more weight than the others. Other factors may also be given consideration. *Id.* at 28-29, 1982 U.S.C.C.A.N. at 206-07.

The retrogression of the number of minority members in a given district, as has taken place in both districts at issue here, has been held in the past to be a violation of § 2 in certain circumstances. *See, e.g., City of Port Arthur v. United States*, 459 U.S. 159, 165 (1982) ("the right to vote may be denied by dilution or debasement just as effectively as by wholly prohibiting the franchise"); *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981) (viewed against background of past discrimination, boundaries of Louisiana parish which were redrawn so that minority voters were split between districts declared violative of VRA); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 143, 149 (5th Cir.) (*en banc*) (reapportionment plan for county offices which fragmented compact group of minority voters into different districts disapproved), *cert. denied*, 434 U.S. 968 (1977); *Buskey v. Oliver*, 565 F. Supp. 1473, 1483-85 (M.D. Ala. 1983) (ordinance redrawing city council lines held invalid for diluting African-American votes).

We now turn to the plaintiffs' claims as they relate to each district in turn.

1. The Fourteenth Congressional District

Plaintiffs' first claim under the VRA concerns the fourteenth congressional district. Testimony adduced at trial established that, as configured under the 1982 redistricting plan, this district consisted of the City of Pittsburgh and a number of the

urban communities just east of the city but within Allegheny county. Under the 1982 plan, the percentage of African-Americans living in the district was 23.860%; under the plan adopted by the Pennsylvania Supreme Court, the percentage would be 17.811%, a drop of approximately 25%.

In the discussion which follows, we first consider whether the proposed change in the composition of the fourteenth congressional district reflects intentionally discriminatory conduct. Next we consider whether the proposed change can be expected to have discriminatory effects on minority voters in the fourteenth congressional district that are cognizable under the Voting Rights Act.

a. Allegations of Intent

At the outset, we stress that the plaintiffs have tendered absolutely no evidence of historical discrimination against African-Americans, racially polarized elections, or voting practices or procedures calculated to exclude African-Americans from participation in the political process in Allegheny County.[19] We do not see this silence as rebuttal of plaintiffs' claims, but simply note it as demonstrative of relevant areas of inquiry in which plaintiffs have failed to carry their burden of proof.

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[19] In their Post-trial Brief, the plaintiffs make the statement that the African-American communities in the City of Pittsburgh, the nearby eastern suburbs, and the former steelmaking communities of the Monongahela River valley are socially, educationally, and economically disadvantaged. This disadvantage, they state, is "sufficient to establish that the members of a minority community have less opportunity than other members of the electorate to participate in the political process and to elect a candidate of their choice." Brief at 59 (citing *Emison v. Growe*, 782 F. Supp. 427 (D. Minn. 1992)). We place very little weight on this assertion, however, as there was virtually no evidence presented which would tie any of these alleged disadvantages in those communities to voting patterns. Essentially what the court was presented with was a bald factual assertion and then a bald conclusion.

The plaintiffs concentrate instead on the fact that the Pennsylvania Supreme Court plan results in a retrogression in the number of African-Americans in the fourteenth congressional district. Initially, they posit that the African-American community in the old fourteenth congressional district was intentionally fragmented by the drafters of the plan, Senator Mellow and his Democratic colleagues in the Pennsylvania Senate. The plaintiffs theorize that the Senate Democrats were intent on drawing the new district lines so that congressman Santorum, the freshman Republican Congressman in the eighteenth congressional district, would find himself in a district populated by a majority of Democratic voters. Under the 1982 plan, the eighteenth district borders the fourteenth district and covers most of the Pittsburgh suburbs in a horseshoe shaped ring. In the Pennsylvania Supreme Court plan, approximately 30% of the voters in the new eighteenth congressional district are registered Republicans, as opposed to just over 50% in the existing eighteenth. *See* M. Barone and G. Ujifusa, *The Almanac of American Politics* 1087 (1992). The only way to accomplish this goal was to fracture the African-American communities of the fourteenth district, plaintiffs argue, and that, given this evidence of intent, the requisite showing of injury under § 2 is diminished. *See Garza v. County of Los Angeles*, 918 F.2d 763, 771 (9th Cir. 1990).

The Supreme Court of the United States has interpreted the intentional discrimination requirement as demanding that in order to show a violation of the fifteenth amendment some type of "racially discriminatory motivation" be present in the enactment of a procedure or plan. *City of Mobile v. Bolden*, 446 U.S 55, 62 (1980); *Garza*, 918 F.2d at 766. We believe the same kind of showing is similarly necessary to establish a violation of the "intentional discrimination" prong of § 2.

We are far from convinced, however, that any intentional discrimination went into the creation of the new fourteenth congressional district. First, as pointed out by the Mellow intervenors, with the exception of Wilkinsburg, a predominately African-American suburb to the east of Pittsburgh,

the vast majority of the Democratic voters funnelled into the new eighteenth congressional district were from the former twentieth, a district which was disbanded. Certainly this fact strongly undercuts the assertion that African-American citizens were discriminated against by being transferred into the eighteenth congressional district from the fourteenth in order to defeat Congressman Santorum in the 1992 election. Second, looking at the overall plan, it would appear that racial discrimination was not on the drafters' agenda, as they added an additional minority majority district in Philadelphia.

The only evidence proffered here with regard to discriminatory intent involves the drafters' admitted political goal of placing Congressman Santorum in a disadvantageous district, and the fact that the minority population in the fourteenth congressional district is decreased by the plan. There is simply no nexus drawn between the intention to disadvantage Congressman Santorum and using African-American voters as the means to achieve this goal. We see the drafters' conduct as having very little to do with race and very much to do with politics. This is in stark contrast to the facts of two cases which plaintiffs offer as authority for their intentional discrimination claim, *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) and *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983). The plaintiffs in *Garza* demonstrated that years and years of racial gerrymandering had taken place with the intention of preserving incumbent white city council seats. 918 F.2d at 771. In *Buskey*, there was clear evidence of a feud between the mayor, who was in charge of the reapportionment of the city council seats, and an African-American councilman whom the mayor deliberately tried to chase from office by reducing the number of African-Americans in his district.

b. Discriminatory Effects

We now address the impact of the Pennsylvania Supreme Court plan on the political power of African-Americans residing in the new fourteenth congressional district and whether that impact--specifically, any political fall-out from reducing the

percentage of African-Americans from 23.860% to 17.811%—is sufficient to state a claim under § 2 of the Voting Rights Act.

It is important to note at the outset that the challenged reduction in the percentage of African-Americans resident in the fourteenth congressional district does not involve changing the district from "minority-in-majority" status to "minority-in-minority" status. Under the 1982 districting which the challenged plan would supersede, African-Americans are now a political minority, constituting slightly under one-fourth of the residents of the fourteenth congressional district. The challenged plan would reduce that minority status somewhat further. The factual question is whether that reduction would constitute a significant diminution of the political influence of African-Americans in the fourteenth congressional district. The legal question is whether, assuming there would indeed be a significant reduction of political influence, such a diminution would be cognizable under § 2.

The legal issue is framed by *Thornburg v. Gingles*, 478 U.S. 30 (1986). In that case, the Supreme Court identified, in the context of a challenge to a multi-member state legislative district, three threshold requirements to a § 2 challenge:

> First, the minority group must demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multi-member form* of the district cannot be responsible for minority voters' inability to elect its candidates.[] Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests.[] Third, the minority must be able to show that

> the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed []—usually to defeat the minority's preferred candidate.

Gingles, 478 U.S. at 50-51 (footnote omitted).

There has been a divergence of opinion among the lower courts as to whether the *Gingles* requirements apply other than in the context of a challenge to a multi-member district. These holdings are of no small significance in the present case, because the first *Gingles* factor would require that a minority group constitute a potential majority of voters in a relatively compact district before being permitted to challenge a redistricting plan pursuant to the VRA. Under *Gingles*, an "influence district"—a district in which a minority group influences political decisionmaking but is not large enough to constitute a majority—could not exist by definition for the purposes of the VRA, and the plaintiffs here could therefore show no statutorily protected interest in the fourteenth congressional district for the purposes of this action. *Compare Amour v. Ohio*, 775 F. Supp. 1044, 1050-52 (N.D. Ohio 1991) (holding that the *Gingles* prerequisites apply only to multi-member districts) and *Emison v. Growe*, 782 F. Supp. 427, 435-36 (D. Minn. 1992) (same) *with Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 651-55 (N.D. Ill. 1991) (refusing to recognize minority influence districts for Voting Rights Act purposes) and *Illinois Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 716 (N.D. Ill. 1992) ("there are serious questions as to whether 'swing' claims are legally cognizable under the Voting Rights Act").

In examining the asserted discriminatory effects anticipated in the fourteenth congressional district, we will assume, *arguendo*, that a significant reduction of minority political power in an "influence district" is judicially cognizable under § 2 of the Voting Rights Act.

There appears to be no dispute that African-Americans in the old fourteenth congressional district generally voted as a bloc. However, the plaintiffs have presented little probative evidence that the remaining African-Americans in the new fourteenth congressional district, who represent some 18% of the population, will be unable to maintain a similar level of influence on elections under the Pennsylvania Supreme Court's plan.

Plaintiffs presented the testimony of Wendell Freeland, an African-American resident of Pittsburgh and a knowledgeable pundit on the subject of Allegheny County politics. Mr. Freeland testified that African-Americans in the old fourteenth congressional district were forced to forge coalitions with other blocs of voters to elect the representatives of their choice. Mr. Freeland also admitted that the democratic Congressman presently representing the district, William Coyne, has been reasonably responsive to the needs and concerns of his African-American constituents, and that Congressman Coyne would have little difficulty securing reelection despite the 6% reduction in the African-American population in the fourteenth district. These facts indicate that African-American voters have been able in the past, and will still be able continue in the future, to combine with like-minded white voters to elect their candidate of choice.[20]

Plaintiffs also argue that African-Americans will have diminished leverage, and thus a diminished voice, in influencing decisions made by the congressman representing the fourteenth congressional district after the election. The court heard

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[20] There was also testimony that the new fourteenth will be heavily Democratic, a fact which increases the importance of the Democratic primary. This will magnify the power of African-American voters, who are overwhelmingly Democrats. Moreover, the plaintiffs offered no evidence of bloc voting on the part of white voters which might result in the consistent defeat of African-American candidates of choice. To the contrary, it appears that African-Americans in Allegheny County have been able to elect their candidate of choice in congressional elections with some regularity.

testimony from Michelle Agatston, a resident of the community of Wilkinsburg, which abuts the eastern side of the City of Pittsburgh. Under the Pennsylvania Supreme Court plan, Wilkinsburg, which has a African-American majority population, is placed in the eighteenth congressional district along with several of the more affluent suburbs of Pittsburgh. Ms. Agatston testified that Wilkinsburg has much in common with the city and little in common with the well-to-do outlying communities with which it will share a congressman.

While relevant to the problems of Wilkinsburg, Ms. Agatston's testimony was of little probative value with regard to the issue before this court—whether the political voice of African-Americans in the fourteenth congressional district will be curtailed by the Supreme Court plan. Indeed, Ms. Agatston stated that she was not aware of any concern on the part of African-American voters in the new fourteenth district about a dilution of their political influence on their representative.

Mr. Freeland also did not venture an opinion on the whether the political voice of African-Americans in the fourteenth district has been diminished by the new plan. He did note that African-Americans in the new eighteenth congressional district, comprising only 7% of that district's population, would likely have little influence leverage over their representative, and that the African-American populations in Pittsburgh, Wilkinsburg and the former mill towns lining the Monongahela River have communities of interest not shared by some of the more prosperous outlying suburbs. He did not testify, though, that the failure to join these communities with high concentrations of African-Americans diluted the influence of African-Americans who will be residing in the new 14th.

Plaintiffs also presented testimony from Dr. Brian Sherman, an expert on voting rights matters. Dr. Sherman's testimony focused on the use of "report cards" found in the *Almanac of American Politics* in an attempt to show that, as the number of African-Americans found in a congressional district

dwindles, the responsiveness of the representative to African-Americans decreases in kind. These report cards reflect the ratings assigned to Congressmen by various interest groups, who judge them according to their voting records on issues of concern to those groups.

Dr. Sherman compared the voting record of Congressman Coyne as rated by ten organizations[21] with that of the retiring representative in the now defunct twentieth congressional district, Joseph Gaydos, and former Congressman William Gray, an African-American who represented the second congressional district of Pennsylvania in Philadelphia until his recent resignation. Approximately 7% of the population in Congressman Gaydos' district was African-American; in Congressman Coyne's district under the 1982 plan, the percentage was just over 23%; the second congressional district, under the 1982 plan, was nearly 85% African-American. Dr. Sherman then compared the three representatives' report cards, using Congressman Gray's ratings as the benchmark for responsiveness to issues important to African-Americans. Congressman Gaydos' rating by the ten groups was off by an average of 24 points from Gray (out of 100); Congressman Coyne missed the Gray mark by an average of 5.9 points. From this comparison, Dr. Sherman concluded that the 25% drop in African-American population in the fourteenth congressional district would diminish minority influence on Congressman Coyne.

We find Dr. Sherman's analysis to be seriously flawed. First, the voting report card as well as the testimony of Mr. Freeland establish that Congressman Coyne is reasonably responsive to African-American concerns. For the court to

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[21] Some organizations doing the grading in the *Almanac* had a generally "liberal" bent, and five had a generally "conservative" focus. For example, two of the "liberal" groups were the American Civil Liberties Union and Americans for Democratic Action, while on the "conservative" side, the Conservative Union and the Chamber of Commerce were represented.

conclude that, because the percentage of African-Americans in his district has dropped six points, he will suddenly become deaf to the petitions of those constituents would be pure conjecture. Second, on cross-examination, it was shown that the correlation between African-American population and responsiveness as gauged by the *Almanac*'s report card is not always present. For instance, Barney Frank, a white Congressman from Massachusetts representing a nearly universally white district, possessed a voting record similar to that of Congressman Gray. Conversely, Mike Espy, an African-American Congressman from Mississippi, holds substantially lower grades than either Congressman Gray or Congressman Coyne despite answering to a constituency which is 59% African-American. *Id.* at 382-83. As a consequence, the court is far from satisfied that, due to the decrease in African-American population in the new fourteenth congressional district, those African-Americans remaining in the district will be denied the degree of influence and access they enjoyed under the 1982 plan.

In conclusion, plaintiffs have presented little evidence that the decrease in African-American population in the fourteenth congressional district under the Pennsylvania Supreme Court plan will result in the loss of African-Americans' ability to elect the candidates of their choice or even to influence the decision-making of their representative. There was no evidence presented showing historical discrimination against African-Americans in Allegheny County nor was evidence presented of previous racially divisive campaigns. Further, there was no evidence offered establishing the existence of white bloc voting which operated to squeeze out minority candidates. Instead, it appears that African-Americans within the fourteenth congressional district, who would be a relatively small minority (under 25%) in any district configuration, form coalitions with others to ensure that their voices are heard and that their votes count as effectively as is possible given their numbers. With regard to political influence, it is clear that the incumbent in the fourteenth congressional district was and is responsive to the concerns of African-Americans, and there was no evidence tendered which suggests to us that he will not continue this practice. Accordingly, considering totality of

circumstances, we conclude that plaintiffs have not shown a violation of the VRA with regard to the fourteenth congressional district.

2. The Second Congressional District

The Pennsylvania Supreme Court plan reduces the percentage of African-Americans in the second congressional district from approximately 81% to 62%; a large portion of that decrease was shifted to the first congressional district, which now boasts a 52.4% African-American population, thus becoming a new minority majority district. *See Mellow v. Mitchell*, 607 A.2d 204, 219-20 (Pa. 1992).

The plaintiffs contend that the reduction of the percentage of African-Americans in the second congressional district below 65% causes a dilution of African-American voting strength in violation of § 2 of the VRA. The 65% figure is used by the Department of Justice, civil rights organizations, and many courts as the benchmark for what will constitute a safe district for a minority candidate of choice. *See Ketchum v. Byrne*, 740 F.2d 1398, 1408 n.7 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). This percentage, higher than a simple majority, is intended to compensate for historically lower voter turnout and registration among minorities in many voting districts and for a generally younger population base.

Plaintiffs, however, ascribe an almost talismanic significance to the 65% marker. Indeed, the simple fact that the minority population has been reduced below the 65% level is essentially the length and breadth of their evidence that African-American voters in the second congressional district are being denied their rights under § 2.

In the absence of evidence, plaintiffs invite us to adopt a burden-shifting procedure similar to that employed in Title VII cases, 42 U.S.C. § 2000e, under the authority of the Supreme Court's decision in *McDonnell Douglas Corp. v. Green*, 411 U.S.

792, 802 (1973). As contemplated by plaintiffs, once they have made out their *prima facie* case by demonstrating that the redistricting plan reduces the minority population below 65% in the district, then the burden shifts to those defending the plan to come forward with justifications for the retrogression. In support of this theory, the plaintiffs note that burden shifting has already been employed in the context of a redistricting challenge. As discussed earlier, the Supreme Court in *Karcher* established the principle that where a challenger to a redistricting plan shows that a lower population deviation between districts could have been achieved, the burden shifts to the drafters of the plan to produce legitimate reasons for the higher deviations. *Karcher*, 462 U.S. at 730-31.[22]

Plaintiffs argue that a burden-shifting analysis is necessary here because plaintiffs would otherwise be "forced to prove a negative," i.e. that a district with an African-American population below 65% will not have the opportunity to elect the candidates of their choice.

We are unwilling to adopt a burden-shifting approach for § 2 claims for a number of reasons. First, as the court noted above, the 65% figure is not an end in itself but is instead a rough guideline. If we required that the drafters of a plan bear the burden of justifying any proposed retrogression below the 65% mark, the court would be inscribing that figure in stone, a significance which is not justified by the figure's history, usage, or rational justification. *See Harrison v. Pennsylvania Legislative Reapportionment Comm'n*, C.A. 92-0603, 1992 U.S. Dist. LEXIS 5315 at *5-6 (E.D. Pa. April 21, 1992) (permitting retrogression under 65% in four Philadelphia state Senate districts); *Illinois Legislative Redistricting Comm'n v. LaPaille*, 786 F. Supp. 704, 712 n.7 (N.D. Ill. 1992) (expert described 65% figure as a " 'rough

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[22] Plaintiffs also point out that burden shifting has been used by the courts in cases involving discriminatory jury selection. *See Batson v. Kentucky*, 476 U.S. 79, 93-94 (1986); *Duren v. Missouri*, 439 U.S. 357, 368 (1979).

rule of thumb' " and noted that the percentage of a majority actually needed varies by area); *Martin v. Mabus*, 700 F. Supp. 327, 336 (S.D. Miss. 1988) (60% majority district approved); *James v. City of Sarasota*, 611 F. Supp. 25, 27-28 (M.D. Fla. 1985) (court approved 50.1% African-American population despite the existence of racial bloc voting, due to high African-American voter turnout);[23] *Jordan v. Winter*, 604 F. Supp. 807, 814 (N.D. Miss.), *aff'd sub nom Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002 (1984) (court rejected plaintiffs' argument that 58.3% African-American district was insufficient to permit African-Americans to elect candidates of their choice). As previously noted, the reason that 65% rather than 50% is used as a rule of thumb to demarcate the lower level of a "safe minority district" is to compensate for any underrepresentation of African-Americans among registered voters or among those persons who actually go to the polls and vote. Where, as in the second congressional district, the percentage of registered African-Americans is equal to or greater than the percentage of registered white voters and the turnout of African-American voters equals or exceeds the turnout of other voters, the justification for strict adherence to the 65% guideline is greatly reduced.

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[23] In *James*, the court quoted in its opinion from a letter sent to it by the Department of Justice. The Department stated that it does not

> "attach particular significance to a 65 percent population figure, and no attempt is made to add arbitrarily increments of five percentage points each to compensate for age, registration and turn-out differences.
>
> Accordingly, the Attorney General has frequently concluded, based on the facts presented in a particular submission, that districts containing less than 65 percent of the total are racially fair districts and that the plan submitted is entitled to Section 5 preclearance."

James, 611 F. Supp. at 32-33.

Second, there is no case law which lends support to the adoption of a burden shifting procedure in § 2 cases, a fact to which counsel for the plaintiffs admitted at trial. Third, plaintiffs cite no authority within the VRA itself or its legislative history that Congress had contemplated a set of shifting burdens. In fact, the statute indicates otherwise, as § 5 of the VRA provides that certain jurisdictions (of which Pennsylvania is not one) must demonstrate to the Department of Justice or to a District of Columbia district court that changes in their voting laws do not have a discriminatory purpose or effect. *See* 42 U.S.C. § 1973c; *Georgia v. United States*, 411 U.S. 526, 538 (1973); *South Carolina v. Katzenbach*, 383 U.S. 301, 335 (1966). Certainly, if Congress had in mind a system such as that contended for by plaintiffs, it would have moved the burden to all states, not just a selected number.

Beyond their arguments regarding the propriety of shifting the burden of proof in the present case, the plaintiffs have presented little evidence which would tend prove the existence of any of the factors listed in Senate Report 97-417. There is no indication before this court of racially biased elections, white bloc voting, historical discrimination, or the existence of election procedures or devices intended to disenfranchise African-Americans in Philadelphia.

In fact, the vast majority of the evidence presented at trial pointed in the opposite direction, that is, that the African American populace in Philadelphia is an effective force at the polling place and that a 65% super majority in any one district is not necessary to ensure that they continue to be able to elect representatives of their choice. Defendants presented the expert testimony of Dr. Lisa Handley, who used both homogeneous precinct analysis (also referred to as "extreme case analysis") and bivariate ecological regression analysis to determine how the

Pennsylvania Supreme Court's plan would affect minorities' ability to elect the candidates of their choice in the second district.[24]

Dr. Handley testified that African-Americans appear to be registering to vote in higher numbers than whites in Philadelphia. She also concluded that African-Americans in the city participate in general elections at approximately the same rate as whites, and actually turn out for the Democratic primaries in greater numbers than whites. Dr. Handley also performed a racial bloc voting analysis, in which homogeneous precinct and bivariate techniques indicated that African-American candidates could look to cohesive support from African-American voters, and that they might expect a portion of white crossover votes as well. Last, defendants' expert examined "recompiled election returns," which involved looking at election returns in precincts which make up the new second congressional district for particular races over the past 10 years or so. From the various returns, she extrapolated that in nearly every case, the candidate preferred by African-Americans would have won in that district. From her study, Dr. Handley concluded that African-Americans would have an equal opportunity to elect the candidates of their choice in the reconfigured second congressional district.

The plaintiffs attacked Dr. Handley's analysis for leaving out two elections involving African-American candidates, the 1985 elections for District Attorney, where a white Republican defeated an African-American Democrat, and the 1984 presidential primary, where Jesse Jackson defeated Walter Mondale by only 12,000 votes (according to plaintiffs, Rev. Jackson garnered nowhere near a majority of the participating democratic voters in Philadelphia). We are reasonably satisfied, however, that Dr.

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[24] Testimony at trial established that these techniques are, although not foolproof, generally recognized as effective tools for gauging minority strength at the polls. Trial Tr. at 478-79. Even plaintiffs' expert stated that he was aware that regression analysis had been accepted in many Voting Rights Act cases. Trial Tr. at 635.

Handley's conclusions are sound. She has employed techniques which are generally recognized as valid in voting rights cases. The raw data that the court has seen would seem to support her conclusions. The fact that she failed to examine two other races, while perhaps sufficient to undercut the weight of her testimony, is certainly not sufficient to sink it entirely.

Moreover, Dr. Handley's judgments are bolstered by anecdotal testimony provided by two African-American state representatives with extensive experience in Philadelphia politics, Harold James and Vincent Hughes. Both gentlemen testified that African-Americans have a substantial voice in electing candidates of their choice in Philadelphia and that they would continue to have that voice in the new second congressional district. *Id.* at 532, 543. In addition, we note that, not inconsequentially, the incumbent African-American Congressman representing the second congressional district, Lucien Blackwell, won the April 28th Democratic primary under the district lines drawn by the Pennsylvania Supreme Court plan.

We also find it telling that, as a matter of measuring support for the plan in the affected communities among African-Americans, several African-American political groups from Philadelphia have thrown their support behind the Pennsylvania Supreme Court plan, including intervenors the Frederick Douglass Society and the Philadelphia Leadership Conference.

Last, in April of this year, a court within the Eastern District of Pennsylvania had an opportunity to examine Philadelphia's racial make-up and its impact on voting. That court rejected the contention that 65% super majority districts are necessary to ensure compliance with the VRA for state Senate elections. In *Harrison v. Pennsylvania Legislative Reapportionment Commission*, C.A. 92-0603, 1992 U.S. Dist. LEXIS 5315 (E.D. Pa. April 21, 1992), the plaintiffs challenged a state senate reapportionment plan which decreased the African-American

populations in four Philadelphia districts below the 65% guideline[25] following the addition of a new district to the city. After considering the expert testimony provided by the defendants, the *Harrison* court concluded that:

> the percentage of African-Americans is sufficient to assure that they can both nominate and elect candidates of their choice. Indeed, the testimony of plaintiffs' expert, when properly examined, leads to essentially the same conclusion. Based upon statistical analyses of past elections in the same geographical area covered by the four new districts now under challenge, the defense expert demonstrated, *inter alia*, that African-American voters tend to vote for African-American candidates, and that there is a substantial crossover voting by white voters for African-American candidates, with the result that African-American voters are not prevented, by white bloc voting, from electing the candidates of their choice.

Harrison, 1992 U.S. Dist. LEXIS 5315, at *67.

Looking at the totality of the circumstances, we are confident that the retrogression of the percentage of African Americans living in the second congressional district to under 65% will not harm the ability of African-Americans within that district to elect the candidate of their choice. Accordingly, we will rule

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[25] Some of the drops in minority population were precipitated by the addition of the new district. In one district, the percentage fell from 93% minority (85.3% African-American) to 65.6% (60.6% African-American); in a second the total minority population had 71.3% (70% African-American) under the old plan, while under the new it was 62.6% (61.5% African-American). *Harrison*, 1992 U.S. Dist. LEXIS 5315, at *2-3.

against the plaintiffs on their VRA § 2 claim with regard to the second congressional district.

B. The Fifteenth Amendment Claim

The fifteenth amendment prohibits discrimination against persons in matters of voting based on race or color. *City of Mobile v. Bolden*, 446 U.S. 55, 61-62 (1980); *Beer v. United States*, 425 U.S. 130, 142 n.14 (1976) (noting that the Supreme Court has never found a redistricting plan invalid under the fifteenth amendment). To be successful, a claimant under the amendment must show 1) that some type of racially discriminatory motivation was involved in the imposition of the election-related procedure or regulation and 2) that the procedure or regulation results in the denial or abridgment of the right to vote. *Id.* at 62-63.

Plaintiffs' fifteenth amendment claim is based on the alleged retrogression in the "influence" of African-Americans in the fourteenth congressional district. As we already noted, plaintiffs allege that the drafters of the plan adopted by the Pennsylvania Supreme Court intended to gerrymander the eighteenth congressional district so that the incumbent freshman Republican Congressman would be placed into a heavily Democratic district. To achieve that end, plaintiffs contend, the drafters decided to pull out some of the African-American voters from the fourteenth congressional district and place them in the eighteenth, thereby decreasing the African-American population in the fourteenth.

We have already held in the context of plaintiffs' VRA claim that plaintiffs have shown no intentional discrimination and, further, have shown no dilution of the ability of African American voters in the fourteenth congressional district to influence elections or to have their voices heard by their Congressman. Accordingly, we will enter judgment in defendant's favor on the fifteenth amendment claim.

V.

We thus reject each of the plaintiffs' challenges to the redistricting plan adopted by the Supreme Court of Pennsylvania.[26] We will dismiss the claims of plaintiffs Ryan, Loeper and Fisher. With respect to all other plaintiffs, judgment will be entered for the defendants.

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[26] To the extent plaintiffs challenge the constitutionality of the redistricting plan adopted by the legislature in 1982, their claims were rendered moot when the Supreme Court of Pennsylvania found that plan to be unconstitutional and enjoined its enforcement. Accordingly, we will dismiss those claims. We will also deny defendants' outstanding motions to dismiss for lack of standing. While not every plaintiff has standing to press all of the claims asserted By plaintiffs, there is at least one plaintiff with standing to press each claim so asserted. *See Specter v. Garrett*, 1992 U.S. App. LEXIS 6969 at *15 (3d Cir. Apr. 17, 1992); *City of Los Angeles v. National Highway Traffic Safety Admin.*, 912 F.2d 478, 485 (D.C. Cir. 1990).

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CHESTER NERCH, HERBERT BARNES, CLARENCE THOMPSON, JOSE, HERNANDEZ, MATTHEW RYAN, F. JOSEPH LOEPER, D. MICHAEL FISHER, MICHELLE AGATSTON, LUIS CRUZ and LAWRENCE R. WATSON, II,	:	
Plaintiffs,	:	
v.	:	Civil Action No. 3:CV-92-0095
BRENDA K. MITCHELL, Secretary of the Commonwealth of Pennsylvania, and WILLIAM BOEHM, as Commissioner of the Bureau of Commissions, Elections and Legislation, Department of State of the Commonwealth of Pennsylvania,	:	
Defendants.	:	

FINAL ORDER AND JUDGMENT

This 13 day of August, 1992, **IT IS ORDERED** that:

1. The claims of plaintiff Ryan, Loeper and Fisher are dismissed for want of jurisdiction.

2. With respect to the other plaintiffs:

(a) Their claims seeking relief with respect to the 1982 redistricting plan are dismissed as moot, and

(b) Judgment is hereby entered for the defendants on the remaining claims.

/s/ Slyvia H. Rambo
SLYVIA H. RAMBO
United States District Judge